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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PIONEER FINISHING CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
AND KENNETH PACHECO et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. In striking the proper balance between the Board's jurisdiction to adjudicate unfair labor practices under Section 10(a) of the NLRA and the National Labor Policy to promote peaceful resolution of labor disputes through private arbitration under Section 203(d) of the LMRA, should the Board defer to the arbitration process so long as the arbitrator's award is not palpably wrong as a matter of law rather than subject such award to a de novo review?

2. Is the Court of Appeals' affirmance of the NLRB's failure to defer to arbitration in reliance upon the Board's change in its deferral policy announced in Suburban Motor Freight, 247 NLRB No. 2, but subsequently not followed limiting deferrals to unfair labor practice issues that were both presented to and considered by the arbitrator contrary to a proper accommodation of the "dual National Labor Policy" of deferral to arbitration and the prevention of unfair labor practices?

3. Did the NLRB fail to properly accommodate the "dual National Labor Policy" when it refused to defer to an arbitration decision where the dispute was voluntarily submitted to binding arbitration, the proceedings were fair and regular, the arbitrator received and considered the same evidence which the Board would consider in a de novo consideration of the unfair labor practice issue, and where the arbitrator's factual findings supported the conclusion that the complained of conduct was arguably permissible under the NLRA?

4. When a Court of Appeals scrutinizes application of the NLRB deferral to arbitration policy, what standard of review should it apply: abuse of discretion or legal error?

5. Where the decision of the arbitrator is susceptible of two interpretations -- one permissible and the other impermissible under the Act -- can the Board or the reviewing court properly find that decision to be "clearly repugnant to the Act?"

6. Where an employee has circulated a leaflet containing statements damaging to the employer, which the arbitrator found the employee knew to be false and misleading, and the arbitrator found such conduct to be unprotected, is the Board or the reviewing court free to disregard the arbitrator's decision?

* * *

Rule 28.1 Certification

Pioneer Finishing Corporation is a wholly owned subsidiary of Nortek, Inc., located at 815 Reservoir Avenue, Cranston, Rhode Island 02910.

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PETITION FOR A WRIT OF CERTIORARI
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_____

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit enforcing the order of the National Labor Relations Board ("Board") is reported at 667 F.2d 199, 109 LRRM 2112 (1981) and is reproduced as Appendix A at pages A-1 to A-10 of the separately bound Appendix to the Petition for Certiorari. The Court's order denying the petition for rehearing appears as Appendix D at page A-114

of the Appendix.

The decision and order of the Board affirming the decision of the Administrative Law Judge is reported at 1299 NLRB No. 182 (1980) and is reproduced as Appendix B at pp. A-11 to A-19 of the Appendix, with the Decision and recommended Order of Administrative Law Judge Bernard Ries appearing at pp. A-20 to A-96 thereof. The Opinion and Award of Arbitrator Robert A. Browning is reproduced as Appendix C at pp. A-96 to A-113 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on November 23, 1981. Pioneer filed a timely Petition for Rehearing which was denied on December 23, 1981, Pet. App. at p. A-114. By Order dated March 19, 1982, Justice Brennan granted an extension of time within which to file this Petition for Certiorari to and including May 22, 1982, Pet. App. at p. A-115. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves §§ 8(a)(1), 8(a)(3) and 10(a) of the National Labor Relations Act, as amended, ("the Act"), 29 U.S.C. §§ 158(a)(1), 158(a)(3) and 160(a), and Section 203(d) of the Labor Management Relations Act of 1947, 29 U.S.C. § 173(d), which provide in pertinent part as follows:

> Section 8(a)(1): It shall be an unfair labor practice for an employer --
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization ...
>
> * * *
>
> Section 10(a): The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8 of this Act) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise ....

* * *

Section 203(d): Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application of interpretation of an existing collective bargaining agreement.

STATEMENT OF THE CASE

A. Background

The Company is engaged at its Fall River, Massachusetts facility in dyeing and finishing textile products. The Company has recognized for over 25 years the Amalgamated Clothing and Textile Workers Union of America ("Union") and its predecessors as the bargaining representative of its approximately 140 production and maintenance employees (Pet. App. A-22).

In 1977, the parties negotiated a new collective bargaining agreement, which agreement was ratified November 6, 1977. By its terms, the agreement entered into November 4, 1977 was in full force and effect until November 5, 1980. Kenneth Pacheco (herein "Pacheco") was a member of the Union's negotiating committee (A-22).

B. The Discharge of Pacheco

Pacheco first became employed by the Company in 1973 and was elected shop chairman of the Company's plant in May of 1977, the top Union representative at the Company's facility (A-22).

In the spring of 1978, upon reviewing the draft of the 1977 through 1980 collective bargaining agreement prepared by the Company, Pacheco raised a question as to the omission in the draft of reference to a health and safety committee which, in Pacheco's view, had been agreed to in the collective bargaining negotiations. Pacheco brought the matter to the attention of Mr. Dufault, the Union's general manager[1]. The latter checked into the matter with the Union and Company negotiators. This inquiry satisfied Dufault that during the negotiations the parties had agreed only

[1] The general manager is the highest official of the local. Dufault had succeeded one John Martin, who held that position during the negotiation of the referenced collective bargaining agreement.

that such a committee would be tried on a temporary basis but would not be included in the collective bargaining agreement (Pet. App. A-23).

However, at Pacheco's urging Dufault scheduled a membership meeting for May 7, 1978 [2] in order for Pacheco to address the membership about the matter (Pet. App. A-23).

In late April or early May Pacheco met with two or three other employees and drafted a leaflet entitled "Fight for Safety Now ... Before It's Too Late." Pacheco reviewed and signed the leaflet as "the Shop Chairman"; his was the only name appearing on the leaflet. The leaflet stated inter alia that the Company "is a dangerous place to work"[3]; warned of "crippling

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[2] Unless otherwise indicated hereafter, all dates refer to 1978.

[3] The leaflet stated that there were 28 serious accidents resulting in 2,248 hours of lost time and wages in 1977 alone. The leaflet is reproduced in full at pp. A-92 to A-93 of the Appendix.

accidents" likely to befall employees in 1978 and urged employees to attend the Union meeting on May 7. (A-24 & 25; A-92 & 93).

On May 2, Pacheco entered the Company's premises at about 7 p.m., at which time he was not working or scheduled to be working, and distributed the leaflet throughout the plant to employees who were at work (A-24) [4] . At no time did Pacheco receive permission from any Company official to distribute the leaflets (A-108) [5] .

On May 5, Thomas Melucci, president of the Company, suspended Pacheco because of his conduct in distributing highly inflammatory and misleading information to employees in working areas in violation of the collective bargaining agreement. After

[4] Pacheco was assisted in the distribution by George Cummings, a union steward who was at work in the plant at the time (A-24).

[5] This is the finding of Arbitrator Browning. Administrative Law Judge Ries, based on his de novo review of the record, suggests without deciding that Pacheco received tacit approval from Company foreman David Queriem to continue distributing leaflets after already having passed out many (A-25).

further investigation, Melucci concluded that Pacheco had entered the plant without permission from anyone in management, that Pacheco had not attempted to verify the accuracy of the statements contained in his leaflet, and was of the view that Pacheco knew the facts to be false and misleading. On May 11, Pacheco was discharged (A-24 to A-30).

C. The Arbitration Proceedings

While the parties' agreement provided for a tripartite board of arbitration, in the interest of expediting the hearing the parties agreed to designate a single arbitrator. Accordingly, Robert A. Browning was selected by Pacheco to arbitrate his discharge, and his selection was agreed to by the Union and Company (A-52) [6].

[6] Browning has for a number of years been a staff mediator for the Massachusetts Board of Conciliation and Arbitration and in that capacity mediated and arbitrated labor disputes in both the public and private sectors (A-52).

The matter was heard on May 25 and the issue submitted was whether the Company was justified in discharging Kenneth Pacheco (A-96) [7] .

Based upon the testimony of the witnesses and the evidence presented at the arbitration hearing, the arbitrator concluded that Pacheco had neither requested nor been given permission to distribute the leaflet in the plant during working hours and that additionally he was not engaged in "protected activity." Accordingly, the arbitrator sustained the discharge (A-108 to A-113).

Arbitrator Browning observed that the issue to be decided is "whether Pacheco was engaged in 'protected activity' in writing and circulating the leaflet in the manner in which he did." (A-110 & A-111). He concluded that the following activities of Pacheco fell outside the pale of protection; drafting and

7 In addition to being represented by the Union, Pacheco was also represented by his private attorney (A-97).

distribution of a leaflet that grossly exaggerated, with an intent to mislead, the Company's safety record (A-108); unauthorized entry into the plant and distribution of a leaflet in violation of Article I and Article II (D) and (E) of the collective bargaining agreement (A-111 to A-112); and efforts to "change the course of collective bargaining" (A-110). The Arbitrator thus concluded that Pacheco's activities not only failed to constitute protected activity but in fact were in violation of the collective bargaining agreement (A-111 to A-112).

D. Proceeding Before The Board

On June 6, 1979, Administrative Law Judge Ries ("ALJ") found that the Company had violated Section 8(a)(1) and (3) of the Act by suspending and then discharging Pacheco. The ALJ rejected the Company's contention that the Board should defer to the Award of Arbitrator Browning. In this regard, the ALJ concluded:

> "Since I conclude that the disposition made by the arbitrator was not consistent with the determination the Board would make, I believe that deferral is not appropriate in this case." (A-55) [8].

On February 21, 1980, the Board affirmed the decision of the ALJ and ordered the Company to reinstate Pacheco and make him whole for any losses suffered as a result of his discharge.

E. Proceedings in the Court of Appeals

The Company petitioned the Court of Appeals for the First Circuit for review of the Board's Order. The Court of Appeals denied the Petition and granted enforcement of the Board's Order, finding inter alia that "in this instance, the Board did not abuse its discretion by deciding not to defer to the arbitrator's award" (A-7).

The Court of Appeals reasoned that the statutory issues implicated in Pacheco's discharge require "individualized analysis" and deference

[8] The ALJ also stated that the arbitrator's opinion did not convey an awareness of the statutory issues involved and, in the view of the ALJ, the arbitrator's decision abridged those priciples. The analysis of the ALJ was based on his de novo review of the record, rather than the facts as found by the arbitrator.

was inappropriate absent an indication that such analysis had been performed. The Court stated:

> It is not enough that the parties raised the statutory issues before the arbitrator and that one might decide that he considered those issues by virtue of the fact that he chose instead to rest his decision on contractual grounds. Where the arbitrator has no duty to consider the statutory issues, it would undermine the purpose of the Act to require the Board to defer merely on the speculation that he must have considered an employee's rights under the statute. (A-7).

The Court of Appeals then reviewed the evidence as found by the Board and concluded that substantial evidence on the record supported the Board's conclusion that Pacheco was discharged for the performance of protected activities in violation of the Act (A-10). Implicit in this finding, the Court of Appeals stated, was its judgment that the arbitrator's award was contrary to the purpose and policies of the Act.

REASONS FOR GRANTING THE WRIT

I. THE CONDITIONS ATTENDANT UPON THE BOARD"S POLICY OF DEFERRAL TO ARBITRATION AWARDS REPRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. FEDERAL LABOR POLICY PLACES CONSISTENT EMPHASIS UPON PROMOTING THE PEACEFUL SETTLEMENT OF LABOR DISPUTES THROUGH ARBITRATION

It has long been recognized that the fundamental intent of the National Labor Relations Act as amended is to minimize industrial strife and promote industrial stability through collective bargaining. This intent is furthered by the encouragement of collective bargaining agreements that require the submission of contractual disputes to final and binding arbitration between the parties. See John Wiley & Sons v. Livingston, 376 U.S. 543, 549 (1964); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960). Moreover, Section 203(d) of the Labor Management Relations Act of 1947 provides:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.
>
> 61 Stat. 154, 29 U.S. § 173(d)

In recognition of these principles, this Court in United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) stated:

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.
>
> Id. at 596.

In Boys Market, Inc. v. Retail Clerks, 398 U.S. 235, 252 (1970) this Court reiterated its approval of the arbitral process, characterizing it as "the central institution in the administration of collective bargaining contracts." Moreover, this Court has emphasized that "[T]he Board does not exist for the 'adjudication of private rights'; it acts in a public capacity to give effect to the declared public policy of the Act to

eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining." Phelps Dodge Corp. v. Labor Board, 313 U.S. 177 (1941).

In apparent recognition of this federal labor policy favoring arbitration, the Board, in Spielberg Manufacturing Co., 112 NLRB 1080 (1955), enunciated its criteria for arbitral deferral, stating that it would, as a matter of discretion, defer to an arbitration award if "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." Id. at 1082. This doctrine, as later elaborated by the Board in International Harvester Co., [9] 138 NLRB 923 (1962) was

[9] In International Harvester, the Board held that it would defer to an arbitrator's award "since it appears to us that the award is not palpably wrong". 138 NLRB at 929 (emphasis added). Subsequent thereto, the Board appeared to move away from the "palpably wrong" standard for determining repugnancy. See, e.g., Douglas Aircraft Co., 234 NLRB 578 (1978); Pincus Brothers, Inc., 237 NLRB 1063 (1978). Recently, the Board has

implicitly approved by this Court in Carey v. Westinghouse Corp., 375 U.S. 261, 270-272 (1964).

B. THE BOARD'S SHIFTING ARBITRAL DEFERRAL POLICY

In the nearly three decades following the Board's decision in Spielberg, the number and nature of the criteria applied to deference decisions have changed. In Raytheon Co., 140 NLRB 883 (1963), enforcement denied on other grounds, 326 F.2d 471 (1st Cir., 1964), the Board implicitly added a fourth criterion to the three set forth in Spielberg; the Board refused to defer to an arbitration award where "the arbitrator did not, and was advised that he could not, even consider evidence that protected concerted and union activities were possible causes for the discharges" that

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[9] Cont'd.
returned to this "palpably wrong" standard. G & H Products, Inc., 261 NLRB No. 47, 110 LRRM 1036 (April 23, 1982). The first of the Questions Presented in this Petition seeks a determination as to whether this "palpably wrong" standard re-embraced by the Board in G & H Products

had been the subject of the arbitration [10] . Id. at 886.

In Airco Industrial Gases, 195 NLRB 676 (1972), the Board extended its fourth criterion to cases in which the arbitration award simply "gives no indication that the arbitrator had not considered the statutory issue. The Board went a step further in Yourga Trucking, Inc., 197NLRB 928 (1972), holding that the

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[9] (Cont'd.)
should be applied in the case at bar rather than the de novo review applied by the Board. In the case at bar, the Board adopted the ALJ's conclusion that the arbitrator's awardwas "repugnant to the Act" because the disposition made by the arbitrator was not, in the ALJ's opinion, the determination the Board would have made. 247 NLRB at 1307. But, subsequently, in G & H Products, the Board held that the test of Spielberg "repugnancy" is not "whether the Board would have reached the same result, but whether the award is palpably wrong as a matter of law." G & H Products, Board Sl. Op. at 3.

[10] Several courts have interpreted this fourth requirement into an analysis of the "clearly repugnant" third requirement of Spielberg, holding that an arbitrator's failure to consider and rule on the statutory issue leads to a decision clearly repugnant to the Act. See, e.g., Bloom v. NLRB, 603 F.2d 1015 (D. C. Cir.

party seeking deference to an arbitrator's award bore the burden of "adduc[ing] proof regarding the scope of matters presented in the arbitration proceeding."

Two years later, the Board expressly overruled Airco and Yourga in Electronic Reproduction Service Corp., 213 NLRB 758 (1974). In that case, the Board asserted that henceforth it would assume that an award resolved statutory as well as contractual issues "except where unusual circumstances are shown which demonstrate that there were bona fide reasons, other than a desire on the part of one party to try the same set of facts before two forums, which caused the failure to introduce such evidence at the arbitration proceeding." Id. at 762 (foornote omitted). [11]

[10] (Cont'd)
(1979); Dreis & Krump Mfg. Co., Inc. v. NLRB, 544 F.2d 320 (7th Cir. 1976); Banyard v. NLRB, 505 F.2d 342 (D. C. Cir. 1974). In the instant case, the ALJ appears to intermesh the "repugnancy" factor with the fourth requirement added in Raytheon.

[11] Clearly, one such unusual circumstance would be where a party takes the position that the arbitrator can not consider evidence relating to the unfair labor practice issue such as in Raytheon.

In Kansas City Star Co., 236 NLRB 866 (1978), the Board deferred to an arbitrator's decision and dismissed a complaint even though the arbitrator made no specific finding that the complained-of conduct that was the subject of the arbitration proceeding constituted an unfair labor practice. The majority of the Board deferred to the arbitrator's decision, noting that the "issues contained in the complaint were presented, considered, and determined in the arbitration proceeding" Id. at 877. The majority also noted that where the arbitrator made factual findings vis-a-vis the contractual issues, it implicitly resulted in a consideration of the unfair labor practice issue. Consistent with this rationale, the Board, in Atlantic Steel Co., 245 NLRB 814 (1979), in deferring to an arbitration award, concluded that "it was necessary only that the arbitrator has considered all of the evidence relating to the unfair labor practice in reaching his or her decision" and that "the Spielberg doctrine could be satisfied where the arbitrator's decision

implicitly resolved the unfair labor practice." Id. at 315.

In 1980, the Board reversed itself once again in Suburban Motor Freight, 247 NLRB No. 2, 103 LRRM 1113 (1980), overruling Electronic Reproduction Service. The Board announced that "we will no longer honor the results of an arbitration proceeding under Spielberg unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator." 103 LRRM at 1114. Nevertheless, shortly after the decision in Suburban Motor Freight, the Board again reverted to the principle as set forth in Atlantic Steel Co. In Bay Shipbuilding Corp., 251 NLRB 809 (1980), the Board deferred to the arbitrator's award that the company's unilateral change of an insurance carrier did not constitute a breach of the collective bargaining agreement and dismissed the complaint, declining to determine whether the same action constituted a violation of the duty to bargain in good faith under the Act. In deference to the dissenting Board member who declined to defer because the arbitrator refused to pass on the

statutory issue, Member Penello observed:

> Nevertheless he [the arbitrator] made factual findings, in the course of resolving the contractual issue, which resolved the unfair labor practice issues. This is all that is necessary for deferral.

Id. at 810.

In his concurring opinion, Member Penello observed:

> A review of the decision shows that while it may be preferable for the arbitrator to pass on the unfair labor practice directly, the Board generally has not required that he or she do so. Rather, it is necessary only that the arbitrator has considered all of the evidence relevant to the unfair labor practice in reaching his or her decision.

Id. at 811.

As the foregoing review of cases demonstrates, the Board's standards for arbitral deferral have undergone many shifts and permutations in a relatively short period. As detailed below in Section II, these shifting Board deferral criteria have met with widely varying and conflicting fates in the Courts of Appeals. As a consequence of the ever shifting Board criteria and appellate disharmony, the arbitral deferral process breeds the very type of proliferating

litigation and labor relations instability the doctrine aims to avoid. Absent a definitive resolution of this issue by this Court, the intent of the Act to promote collective bargaining by encouraging parties to resort to contractual means for the peaceful resolution of industrial disputes will be fatally frustrated by permitting voluntary arbitration agreements to be avoided through multiple litigation of the same set of facts.

II. THE DECISION BELOW CONFLICTS WITH PERSUASIVE APPELLATE AUTHORITY, REFLECTING A GENERAL DISARRAY OF THE COURTS OF APPEALS ON THIS ISSUE, AND NECESSITATES A DEFINITIVE RESOLUTION BY THIS COURT

The affirmance by the First Circuit of the Board's refusal to defer to the arbitration is squarely at odds with a decision on point by the Third Circuit, NLRB v. Pincus Brothers, Inc., 620 F.2d 367 (3d Cir. 1980), denying enforcement of 241 NLRB 805 (1979) [12] . The employer in Pincus Brothers discharged an employee

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12 See also 237 NLRB 1063 (1978).

for distributing a leaflet which it believed to be defamatory and unprotected under the Act. The leaflet called a plant meeting a "circus," said the employer was instituting "pay cuts" to "our already stinking pay checks," that the shop "ain't no different from any other stinking garment 'shop in this city" and that the employer was making a "lousy style of clothes."

An arbitrator issued an award upholding the employee's discharge under the collective bargaining agreement. The arbitrator concluded that the discharge was for cause because in part the employee had intentionally misrepresented or distorted facts. The Board, on a motion for summary judgment, refused to defer to the arbitrator's award, concluding that it was repugnant to the purposes of the Act. The Board remanded the case to an Administrative Law Judge for a de novo review of the record, upon which the Board based its conclusion that the employer had violated the Act by discharging the employee who distributed the leaflet.

On appeal, the Third Circuit held that the Board's refusal to defer to the arbitration award was an abuse of discretion [13]. The Third Circuit held that the arbitration award finding the contents of the leaflet knowingly false rendered the leaflet unrpotected under the Act, stating:

> From the arbitrator's findings it appears at least arguable that Richardson's leaflet can be labeled as 'defamatory or insulting material known to be false,' Linn v. Plant Guard Workers, 383 U.S. 53, 61 (1966), and thus can be characterized as unprotected under the Act. [14]

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[13] In his concurring opinion, Judge Garth argued that the reviewing court should measure the Board's deferral decisions under a standard of legal error. 620 F.2d at 377. Under this view, the Board exhausted its discretion by adopting the Spielberg test, and application of that test to a particular case involves only nondiscretionary questions of law. Id. at 380-81. (See 4th Question Presented.)

[14] 620 F.2d at 376. The Third Circuit also found Richardson's actions arguably unprotected because (1) they constituted unprotected disloyalty; (2) because they were designed to interfere with the employer's long-established collective bargaining relationship with the union, citing Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975); and (3) because they were motivated by personal pique.

Consistent with its holding in Pincus Brothers, the Third Circuit, in NLRB v. General Warehouse Corp., 643 F.2d 965 (3d Cir. 1981), held that the Board was not required to defer to an arbitration award absent "some evidence" that the statutory issue has been decided. The Third Circuit distinguished Pincus Brothers because in that case both the arbitrator and Board treated the dismissal as precipitated by an employer's distribution of a leaflet, whereas in General Warehouse, the arbitrator made his decision without considering the employer's unlawful motives.

The conflict between the decision below and that of the Third Circut in Pincus Brothers is the clearest example of disarray among the courts of appeal on the subject of the Board's deferral to arbitration, but there is abundant other evidence as well. In Distillery Workers, Local 2 v. NLRB, 664 F.2d 318 (2d Cir. 1981), cert. den. May 17, 1982 (sub nom Liquor Salesmen's Union Local No. 2 v. Charmer Industries, et al. and NLRB, No. 81-1544), the Second Circuit held that

the Board abused its discretion in refusing to defer to an arbitration award even though the arbitrator had not addressed the unfair labor practice allegation of a refusal to bargain over a unilateral change in working conditions [15]. The Second Circuit reasoned that the arbitrator's findings of fact were "necessarily dispositive of the statutory issue" and, accordingly, the arbitrator "in substance" had "clearly decided the statutory issue [16]. Id. at 325.

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[15] In the Petition For a Writ of Certiorari, in No. 81-1544, in which the Court denied certiorari, the Union argues that the Second Circuit applied an inappropriate standard for considering the deferral issue and argues that the appropriate standard should be that which was formulated by the First Circuit in the case at bar.

[16] While the First Circuit in the instant case paid lip-service to the decision of the Second Circuit in Distillery Workers, it is readily apparent that the two decisions represent sharply conflicting views of the arbitral deferral criteria. Thus, as will be set forth in detail below, the factual findings of Arbitrator Browning are also "necessarily dispositive of the statutory issue."

Other courts of appeals have also reversed the Board's refusal to defer in circumstances similar to the present case. In NLRB v. Motor Convoy, Inc., 109 LRRM 3201 (March 24, 1982), denying enforcement of 252 NLRB No. 175 (1980), the Fourth Circuit held that the Board was required to defer to a joint arbitration committee award finding the employee's discharge was for just cause even though evidence relevant to the unfair labor practice allegation was not presented to the joint committee. The Fourth Circuit reasoned that the unfair labor practice issue was identical to the contractual issue because the collective bargaining agreement provided that employees could not be discharged for union activities. Accordingly, resolution of the "just cause" issue of necessity resolved the statutory issue. And the Ninth Circuit, in Douglas Aircraft Co. v. NLRB, 609 F.2d 352 (1979), held that the Board abused its discretion in refusing to defer to an ambiguous award, stating:

> The reasoning, if ambiguous, could have been interpreted in a non-repugnant way, and should have been in order to give arbitration the 'hospitable acceptance' necessary if 'complete effectuation of the Federal Policy is to be achieved.'

609 F.2d at 355, quoting from International Harvester Co., 138 NLRB 923, 927 (1962), aff'd sub. nom. Ramsey v. NLRB, 327 F.2d 784 (7th Cir. 1964).[17]

The First Circuit requirement that the arbitrator make an "individualized analysis" of the statutory issues finds support in the Seventh Circuit, wherein the court has held that an arbitrator's falure to "discuss thoroughly" the statutory issue precludes deference. St. Luke's Memorial Hospital, Inc. v. NLRB,

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[17] The Douglas Aircraft decision also recognized that "[i]f the reasoning believed an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award was 'clearly repugnant' to the Act." 609 F.2d at 354. Accord: Pincus Brothers, 620 F.2d at 374.

623 F.2d 1173, 1178 (7th Cir. 1980). In the Tenth Circuit, an arbitrator's award which "clearly ignores" Board and court precedent, warrants no deference. NLRB v. Gould, Inc., 638 F.2d 159, 166 (10th Cir. 1980), cert. den. sub. nom. Brown Boveri Electric, Inc. v. NLRB, 101 S. Ct. 3065 (1981).

III. THE ARBITRATOR"S FINDINGS OF FACT ARE NECESSARILY DISPOSITIVE OF THE STATUTORY ISSUE AND ARE NOT CLEARLY REPUGNANT TO THE ACT

A. DEFERRAL CRITERIA

The First Circuit's formalistic and rigid approach to arbitral deferral, requiring the arbitrator to engage in an "individualized analysis" of the statutory issues, can only serve to undermine the arbitral process and erode the industrial stability achieved under the Act. Indeed, the approach of the court below to arbitral deferral goes far beyond the test which the Board itself has established, i.e., that deferral simply requires that the arbitrator "make factual findings, in the course of resolving the contractual issue, which resolved the unfair labor practice issues." Bay Shipbuilding, supra, 251 NLRB at 811.

The court below patently failed to to give proper weight to the language of the Act and this Court's admonition that the Act's intent is furthered by the encouragement of collective bargaining agreements that require the submission of contractual disputes to final and binding arbitration betweenthe parties. John Wiley & Sons v. Livingston, supra; United Steelworkers of America v. Warrior & Gulf Navigation Co., supra. Rather than encouraging the parties' resort to voluntary arbitration as a means of settling industrial disputes, the decision below can only serve to undermine the arbitral process by encouraging multiple litigation of the same set of facts. Moreover, the "individualized analysis" requirement can only lead to minute and overzealous dissection of arbitration awards contrary to the approach required by this Court in United Steelworkers of America v. Enterprise Wheel & Car Corp., supra. As the Ninth Circuit recently noted in Douglas Aircraft Co.:

> Overzealous dissection of opinions by the NLRB, as well as by courts, can deter the writing of full opinions, and it should not be assumed that an arbitrator has snubbed the Act any more than he has exceeded his authority.

609 F.2d at 355.

B. THE DECISION BELOW MISCONCEIVES THE TEST OF PROTECTED ACTIVITY

The First Circuit compounds its misunderstanding of the role of arbitral deferral in furthering the purposes of the Act by misconceiving the nature of the statutory issue. Thus, the court below finds that the Board did not abuse its discretion in refusing to defer to the arbitration award because the "arbitrator's decision did not reflect, directly or indirectly, consideration of any factors germane to the statutory issue" and because "it would undermine the purpose of the Act to require the Board to defer merely on the speculation that he must have considered an employee's rights under the statute." Refusing to defer to the arbitration award, the court below then reviews the Board's decision on the merits under the substantial evidence

test. In so doing, the court below, and the Board in its de novo review of the evidence established at the unfair labor practice hearing, reviews the identical factors considered by the arbitrator in his opinion, the contents of the leaflet and the true facts on plant safety and accidents.

The statutory issue is whether the content of Pacheco's leaflet is protected under the Act. Springfield Library & Museum Association, 238 NLRB 1673 (1974). In Springfield Library, the Board expressly adopted the standard of Linn v. United Plant Guard Workers of America, Local 114, 383 U. S. 53 (1966) in determining whether the content of a leaflet is protected under the Act. Under these standards, a communication will lose its protection under the Act if published with knowledge of its falsity or with reckless disregard as to its truth or falsity. As stated by this Court in Linn, Board doctrine holds that the Act does not give parties "license to injure the other intentionally by circulating defamatory or insulting material known to be false" and

one who does so loses the protection of the Act. Under these standards, one must look to the content of the communication and knowledge and/or intent of the communicator. This is precisely what the arbitrator did.

Thus, with respect to the content of the literature circulated by Pacheco, the arbitrator found that Pacheco "grossly exaggerated, with the intent to deliberately mislead [sic] the safety record of the plant in 1977." In support of this conclusion, the arbitrator considered the leaflet which stated, inter alia:

> Pioneer Finishing is a dangerous place to work ... in 1977 alone, there were 28 serious accidents resulting in 2,248 hours of lost time and wages! Which of us will be victims of these crippling accidents daily because of holes in the floor, falling lights, defective trucks and machinery, etc. [emphasis supplied].

He also considered the facts as to the actual safety record of the plant. These undisputed facts establish that of the 28 accidents in 1977, 19 resulted in no lost time. Of the 9 accidents which resulted in lost time, there was no evidence that they were serious enough to constitute

"crippling accidents". Pacheco knew from the very same document from which he obtained the figure of 28 total occupational injuries and illnesses that there were not 28 serious accidents but only 9 accidents involving any lost time! (A. 30a-31a). Further as found by the arbitrator, ". . . there were only four accidents having lost time of more than 7 days." Moreover, had Pacheco inquired, he would have discovered that of these four accidents, one was a result of an injured back, a second was a result of a pulled muscle, and a third was the result of a skin rash. These three accidents caused 305 out of the 333 lost work days in 1977. (A. 31a).

Thus, the facts, as found by the arbitrator, establish that the contents of the leaflet were untrue and Pacheco published these false statements "with the intent to deliberately mislead [sic]."[18] [Emphasis added]. These

[18] The court below simply ignored the arbitrator's findings. The Board acknowledged that the accidents were neither "serious" nor "crippling" but observed that Pacheco did not intend that fellow employees would interpret his

findings made by the arbitrator are indistinguishable from the reckless or knowing falsity test of Linn. Nor does the Court's opinion in Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin, 418 U. S. 264 (1974) mandate a contrary conclusion as found by the court below. In Letter Carriers v. Austin, this Court found that only one factual statement had been made, that the employees were "scabs." This factual statement was found to be true. This Court held that before the test of reckless or knowing falsity can be met, there must be a false statement of fact. However, the Court went on to observe that the leaflet would have lost its protection if "used in such a way as to convey a false representation of fact." Id. at 286.

The arbitrator found that false statements of fact had been made in the leaflet distributed by Pacheco and that Pacheco distributed these statements with

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18 (Cont'd.)
statements as "representations of fact." The Board found that the statements were mere "rhetorical hyperbole," thereby substituting their judgment on a factual issue for that of the arbitrator.

the "intent" to mislead. There can be little doubt that such factual findings of necessity dispose of the statutory issue, whether the leaflet is protected under the Act. Springfield Library & Museum Association, supra; Linn v. United Plant Guard Workers, supra. Moreover, such a finding perforce requires a determination that the decision of the arbitrator is not clearly repugnant to the Act [19]. NLRB v. Pincus Brothers, supra.

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[19] The arbitrator also determined that Pacheco's conduct was intended to undermine the collective bargaining relationship between the Company and the union, and that Pacheco's distribution of the literature while acting as a Union representative was unprotected. These factual findings are not clearly repugnant to the Act, either. Emporium Capwell v. Western Addition, supra; NLRB v, Pincus Brothers, supra.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PIONEER FINISHING CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
AND KENNETH PACHECO et al.,
Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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NO. _____

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PIONEER FINISHING CORPORATION,

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RESPONDENTS.

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United States Court of Appeals
For the First Circuit

No. 81-1038

PIONEER FINISHING CORPORATION,

PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT,

and

KENNETH PACHECO, RICHARD M. DROLET, and JOHN MONIZ,

INTERVENORS.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before

COFFIN, *Chief Judge*,
ALDRICH and BREYER, *Circuit Judges*.

Harold N. Mack, with whom *Morgan, Brown, Kears & Joy* was on brief, for petitioner.

Helen L. Morgan, Attorney, with whom *William A. Lubbers*, General Counsel, *John E. Higgins*, Jr., Deputy General Counsel, *Robert E. Allen*, Acting Associate General Counsel, *Elliott Moore*, Deputy Associate General Counsel, and *W. Christian Schumann*, Attorney, was on brief, for respondent.

Emily J. Novick, with whom *Dan Kesselbrenner*, and *Doyle, Playter, Novick & Berkin* was on brief, for intervenors.

November 23, 1981

COFFIN, *Chief Judge*. Pioneer Finishing Corporation seeks review of an order issued by the National Labor Relations Board requiring it to reinstate three employees in the same or similar jobs from which they had been discharged, and the Board seeks enforcement of its order. After reviewing questions of law, and after finding that there is substantial evi-

dence on the record to support the Board's conclusion that the discharge of two employees violated § 8(a)(1) of the National Labor Relations Act and the discharge of one violated §§ 8(a)(1) and 8(a)(3), we hold that the Board's order should be enforced.

Pioneer Finishing operates a factory in Fall River, Massachusetts, in which approximately 140 employees dye and finish textile products. The employees, unionized for a number of years, had negotiated a new collective bargaining agreement late in 1977. Although the wage provisions went into effect immediately, other provisions were deferred until the Company prepared a final copy of the agreement for signing.

Among the topics of negotiation was the question whether formation of a health and safety committee should be required by the agreement. Believing that the negotiators had agreed upon formation of such a committee, Union Shop Chairman Kenneth Pacheco was distressed to find that the final draft prepared by the Company in the spring of 1978 omitted reference to the committee. The Company took the position that the committee was to be implemented on a trial basis but not included in the contract. It is not clear whether, at that point, the contract had been signed or whether further negotiation was possible. Believing the issue still to be negotiable, Pacheco got the Union to schedule a meeting of employees to discuss the omission of the clause from the contract. He helped prepare a leaflet discussing working conditions at the plant and the status of the health and safety clause, and recommending that employees act by taking note of safety issues and by attending the Union meeting. He signed the leaflet as Shop Chairman and distributed the leaflet on the Company premises during his off-hours on May 2.

The leaflet stated in part that:

> "Pioneer Finishing is a dangerous place to work .... In 1977 alone, there were 28 serious accidents resulting in 2,248 hours of lost time and wages! Which of us will be

> victims of these crippling accidents in 1978? How many of us risk accidents daily because of holes in the floor, falling lights, defective trucks and machinery, etc? Only an effective Health & Safety Committee can ensure a safer future for us all ....
>
> "The company wants the Health & Safety clause striken from the contract .... The reason the company wants this is clear. After all, an effective Health & Safety Committee forcing the company to fix the hazards affecting you and I is bound to cost them money ...."

On May 5, three days after Pacheco distributed the leaflet, he was suspended by Thomas Melucci, President of the Company. In a letter to the Union explaining the reasons for the discharge, Melucci assumed that the contract was in effect. He wrote that Pacheco had violated the contract because he did not have permission to distribute the leaflet and should instead have posted it on the bulletin board provided under the contract for official notices.[1] Melucci also stated that the leaflet disrupted the "harmonious relationship" between the Company and the Union guaranteed by the agreement because it contained false and inflammatory statements. Specifically the Company claimed that not all 28 accidents were either "serious" or "crippling", that there were no grounds for stating that the Company was not respecting the

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[1] The two relevant clauses in the collective bargaining agreement state that:

> "*Bulletin Boards*: The Employer agrees to provide space on its bulletin board for the posting of official notices relating to Union meetings and other Union affairs."
>
> "*Access to Premises*: A representative or representatives of the Union shall have access to the plants of the Employer for the purpose of adjusting grievances, negotiating the settlement of disputes, investigating working conditions and generally for the purpose of carrying into effect the provisions and aims of this agreement. He shall make an appointment in advance of such visits. In any event, the representative of the Union shall on arrival at the plant clear through the regular channels of the Employer for receiving visitors and may be accompanied by a representative of the Employer on any visit into the plant."

agreement reached during negotiation and that it was reneging because it did not wish to spend the money that would be required. Approximately a week later, Pacheco was discharged. [Matter not pertinent to printed opinion deleted.]

The issue of Pacheco's discharge was submitted to a single arbitrator by agreement of Pacheco, the Union, and the Company. After a hearing, the arbitrator concluded that the Company was justified in discharging Pacheco. In reaching this conclusion, he found that Pacheco had entered the Company's premises and circulated the leaflets without permission in violation of the contract, that Pacheco's activity was not protected by virtue of his status as Shop Chairman, that the content of the leaflet grossly exaggerated safety conditions at the plant, and that it violated the contract by destroying the "harmonious relationship" between the Union and the Company. Pacheco protested this decision by filing a charge against the Company, claiming that his discharge violated §§ 8(a)(1) and 8(a)(3) of the Act. The administrative law judge (ALJ), after determining that he did not need to defer to the arbitrator's decision, found that the Company was not justified in discharging Pacheco because his activities were protected by the Act. The Board upheld that conclusion. [Matter not pertinent to printed opinion deleted.]

Deference to the Arbitrator

Although the Board is not required by statute to defer to the decision reached by an arbitrator, it has established a policy of deference to encourage the voluntary settlement of labor disputes. *Spielberg Manufacturing Company*, 112 N.L.R.B. 1080, 1082 (1955). Recognizing, however, that it also has the statutory responsibility to remedy unfair labor practices, it has defined criteria to determine when deference is appropriate: the arbitration proceedings must appear to have been fair and regular, all parties must have agreed to be bound, and the decision cannot be clearly repugnant to the purposes and policies of the Act. *Id.* In addition, the arbitrator must have considered the unfair labor practice

issue. *Suburban Motor Freight, Inc.*, 247 N.L.R.B. No. 2 (Jan. 8, 1980); *Raytheon Company*, 140 N.L.R.B. 883, 884 (1963), *enf. denied on other grounds*, 326 F.2d 471 (1st Cir. 1964).

In choosing not to defer, the ALJ wrote that

> "The [arbitrator's] decision does refer to the concept of 'protected activity', but the arbitrator defines that term in a sense totally at odds with the statute, and his statement of the issue presented indicates that he felt confined solely to the contractual questions: 'The issue before me was *not* whether certain employees thought unsafe conditions existed, but whether Pacheco exceeded the Contract in doing what he did' [emphasis in original] .... The arbitrator nowhere conveys an awareness of the statutory principles implicated by [the issue of Pacheco's right to engage in concerted activity], and his decision, in my view, abridges those principles."

Although not expressly so stating, the ALJ was in effect concluding that deference was not appropriate because the arbitrator had not considered the statutory issues and because the result was not consistent with the Act.

In reviewing the correctness of this conclusion, we look to whether the ALJ abused his discretion in deciding that the factors calling for deference were not present. *Liquor Salesmen's Union Local 2* v. *NLRB*, No. 80-4264 (2d Cir. July 29, 1981), slip op. at 4319 & n.3; *Ad Art, Inc.* v. *NLRB*, 645 F.2d 669, 674 (9th Cir. 1981); *NLRB* v. *Pincus Bros., Inc., — Maxwell*, 620 F.2d 367, 372 (3d Cir. 1980). We find that there was no abuse of discretion primarily because the arbitrator did not adequately address the statutory issue.

The arbitrator's opinion clearly evidences that he was solely concerned with whether Pacheco had violated the contract by distributing the leaflets. Although he initially stated that the question was whether Pacheco was engaged in "protected activity", to determine if the activity was protected, he looked to whether the activity violated the contract. He

found as violations Pacheco's unauthorized entry into the premises and the distribution of untruths that attempted to destroy the "harmonious relationship" protected by the contract.

There are occasions when consideration of the contractual issues may determine the statutory issues, and therefore allows the Board to find that the arbitrator necessarily and clearly, though not explicitly, considered the statutory issue. This occurs when the statutory and contractual issues are congruent because they rest upon the same factual determinations. *See, e.g., Liquor Salesmen's Union Local 2* v. *NLRB, supra,* slip op. at 4317; *Ad Art, Inc.* v. *NLRB, supra,* 645 F.2d at 677; *Bloom* v. *NLRB,* 603 F.2d 1015, 1021 (D.C. Cir. 1979); *Bay Shipbuilding Corp.,* 251 N.L.R.B. No. 114 (Aug. 27, 1980).

In the case at bar, the finding that the contract was violated, even if taken as correct, does not of necessity determine that Pacheco had no protection under the statute. To so determine, the arbitrator would have had to consider the separate, statutory issues: whether the content of the leaflet was protected under the statute and whether the contract waived statutory rights to enter and to distribute the leaflet. These issues require individualized analysis and hence prevent deference where, as here, there is no indication that this analysis has been performed.

It is not enough that the parties raised the statutory issues before the arbitrator and that one might decide that he considered those issues by virtue of the fact that he chose instead to rest his decision on contractual grounds. Where the arbitrator has no duty to consider the statutory issues, it would undermine the purpose of the Act to require the Board to defer merely on the speculation that he must have considered an employee's rights under the statute. *See Stephenson* v. *NLRB,* 550 F.2d 535, 540 (9th Cir. 1977). Moreover, it is quite clear that the arbitrator's decision did not reflect, directly or indirectly, consideration of any factors germane to the statutory issue. Although deference may advance the

policies of the statute by encouraging voluntary settlement, in this instance the Board did not abuse its discretion by deciding not to defer to the arbitrator's award.

Because we find that one of the deferral criteria was not met, we do not need also to review the ALJ's conclusion that the result was contrary to the purpose and policies of the Act. *Compare NLRB* v. *Max Factor and Co.*, 640 F.2d 197, 203 n.6 (9th Cir. 1980). Such a judgment, however, is implicit in our discussion below on the question whether substantial evidence supports the Board's finding that Pacheco's activities were protected under the Act.

Pacheco's Discharge

Having correctly decided that deference was not appropriate, the Board concluded that Pacheco's activities were protected under the statute and therefore could not be used as reason for his suspension and subsequent discharge. In so finding, the Board had to determine that the substance of the leaflet warranted protection under the Act, and that Pacheco had a protected right to be on the premises and to distribute leaflets. We review these findings to the extent of considering whether the Board applied the law properly and whether substantial evidence on the record as a whole supports its findings.

Examining first whether the message conveyed by Pacheco's activities was protected, we find ample evidence to support the Board. The leaflet dealt directly with an important condition of employment, the health and safety measures to be taken to protect employees. This is a topic of discussion falling clearly within the core of concerns protected by the Act. The action urged by the leaflet — inclusion of a health and safety clause in the contract — does not affect the status of this protection. Although the Company reasons that this call to reopen negotiations after a contract had been signed violated the contract and the Act by disrupting harmonious relations, substantial evidence exists to support the Board's finding that there was reason to question whether

the contract had been signed by all parties at the time of Pacheco's activities. As a result, there may have been no contract to violate, and the courses of action suggested in the leaflet would not have eroded the respect for a finalized collective bargaining agreement required by the Act.

Lastly, the particular wording of the leaflet does not remove Pacheco's activities from the sphere of protection afforded by the statute. Although the language in the leaflet may have been inflammatory, the Act protects expression that may not be totally accurate. Inaccurate or misleading statements lose their protection only if they are "deliberately or maliciously false". *El Mundo Broadcasting Corp.*, 108 N.L.R.B. 1270, 1278-79 (1954). The Supreme Court has recognized that "rhetorical hyperbole" is common in labor disputes and must be protected, *Dominion Branch No. 496, National Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 286 (1974), and that the "vigorous exercise of [section 7 rights] must not be stifled by the threat of liability for the over-enthusiastic use of rhetoric". *Id.* at 277.

While the portrayal of the 28 injuries as serious or crippling was not accurate, we agree with the Board's assessment that the leaflet's characterization of the injuries was "rhetorical hyperbole" not to be construed as fact by fellow employees. There is no evidence that any misstatements of fact were made maliciously or without some foundation in fact. *See El Mundo Broadcasting Corp., supra*, 108 N.L.R.B. at 1280. We also agree with the Board that the assertion that the company wished to save money is an argument typical to labor disputes, to be interpreted in such a light. Lastly, the Board had reason to conclude that Pacheco was not intentionally maligning the Company when he wrote that he did not think that it would live up to the agreement to include the health and safety clause in the contract. Pacheco genuinely believed that the Company had agreed to the clause during negotiations and that its failure to include the clause was the result of bad faith, not the Company's good faith understanding that the clause was not to be included.

There remains the question whether the manner in which Pacheco distributed the leaflets removed him from the protection of the Act. He entered the premises during his off-hours and distributed the leaflets to the employees while they were working.

The Board is correct first in concluding that the contract, if in effect, did not waive the statutory right of employees to distribute Union materials. It limited the right of access of Union officials to the premises to the performance of specific duties, which did not include the distribution of literature. It also established the bulletin board as the place in which official notices should be posted. These specific restrictions cannot be interpreted, however, as a waiver of the right of employees to circulate leaflets that deal with the conditions of their employment. *See Ford Motor Co.*, 221 N.L.R.B. 663, 665 (1975) (contractual waiver of employees' rights to distribute union literature would be invalid).

Pacheco was in the unusual situation of being both an employee and, as Union Shop Chairman, a Union official. Although we have in the past recognized that a contract may validly restrict the rights that a union official would otherwise enjoy as an employee, *NLRB* v. *Wilson Freight Co.*, 604 F.2d 712, 726-27 (1st Cir. 1979), *cert. denied*, 445 U.S. 962 (1980), Pacheco's activities here have not been specifically proscribed by the contract. When a union official is also an employee, it cannot be assumed that he had waived rights he would have as an employee unless he has done so explicitly or unless his activities are destructive to the collective bargaining process to which he is specifically committed as a union official. *Compare id.*

The fact that Pacheco was off-duty at the time that he entered the premises does not render his activity unprotected. Whether off-duty access is protected under the Act depends upon the balance between the employees' § 7 rights and the employer's private property rights. *GTE Lenkurt*, 204 N.L.R.B. 921 (1973). Although the Act cannot

require access when a company has asserted its property rights by issuing a no-access rule, the balance shifts when the company has not taken a strong stand. In this instance, the Company has no rule preventing access but instead has in fact allowed non-working employees to enter the premises to distribute materials to working employees. Under these circumstances, we uphold the Board's finding that Pacheco's off-duty status did not remove his activity from the protection of the Act.

Finally, the fact that the leaflets were distributed to employees who were working does not justify Pacheco's discharge. Where distribution during working time is not specifically prohibited, distribution is protected as long as it does not interfere with production. *Daylin, Inc.*, 198 N.L.R.B. 281 (1972), *enf'd*, 496 F.2d 484 (6th Cir. 1974). There is no evidence that production was substantially impaired in this instance. We conclude, therefore, that the Board applied the law properly and that there is substantial evidence on the record to support the Board's conclusion that Pacheco was discharged for the performance of protected activities in violation of the Act.

[Remainder of opinion not published]

The Board's order shall be enforced.

Adm. Office, U.S. Courts – Addison C. Getchell & Son, Inc.

APPENDIX B

247 NLRB No. 182 FJT

D-6116
Fall River, MA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PIONEER FINISHING CORPORATION
and
KENNETH PACHECO, an Individual — Case 1-CA-14495-1

RICHARD M. DROLET, an Individual — Case 1-CA-14495-2

JOHN MONIZ, an Individual — Case 1-CA-14526

DECISION AND ORDER

On June 6, 1979, Administrative Law Judge Bernard Ries issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, General Counsel filed cross-exceptions and a brief in support thereof and in partial support of the Administrative Law Judge's Decision, and Charging Party filed a brief in opposition to Respondent's exceptions.

Pursuant to the provisions of

Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, [1] and conclusions of the Administrative Law Judge, to modify his remedy, [2] and to adopt his recommended Order, as modified herein. [3]

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] See Isis Plumbing & Heating Co., 138 NLRB 716 (1962), for rationale on interest payments.

[3] In light of our Decision in Hickmott Foods, Inc., 242 NLRB No. 177 (1979), which issued after the Administrative Law Judge's Decision in this case, we will substitute "in any like or related manner" for "in any other manner" in par. 1(b) of the recommended Order and will correct the notice accordingly.

The General Counsel excepted to the Administrative Law Judge's failure to find that a remark made to employee Cummings by Supervisor Kitchen violated Section 8(a)(1) of the Act. We find merit in this exception.

Cummings and employee Rapoza had distributed a leaflet, as had Pacheco. As found by the Administrative Law Judge, Respondent's suspension and later discharge of Pacheco for engaging in this protected activity was unlawful. Following Pacheco's suspension and prior to his discharge, Kitchen told Cummings that he had "better go to a lot of novenas, because if Pacheco--pending further investigation, if Pacheco went, me and Dave Rapozo would be next."

We disagree with the Administrative Law Judge that such a remark was not coercive because, following Pacheco's discharge, no punishment was inflicted on Cummings or Rapozo. Rather, we find that Kitchen's remark constituted a clear threat of discharge for engaging in protected activity, and was in violation of Section 8(a)(1) of the Act.

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ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and hereby orders that the Respondent, Pioneer Finishing Corporation, Fall River, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 1(b) and add the following as paragraphs 1(b) and (c):

"(b) Threatening employees with discharge for engaging in activities protected by Section 7 of the Act.

"(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act."

2. Substitute the following for paragraph 2(a):

"(a) Offer Kenneth Pacheco, Richard Drolet, and John Moniz immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to

substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed."

4. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. February 21, 1980

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John H. Fanning, Chairman

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Howard Jenkins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER TRUESDALE, concurring in part and dissenting in part:

Like my colleagues, I would affirm that portion of the Administrative Law Judge's Decision which declines to defer to the arbitration award concerning employee Pacheco and finds that Pacheco's discharge for engaging in protected concerted activity violated Section 8(a)(3) and (1) of the Act.[4] I also join in my colleagues finding that Respondent violated Section 8(a)(1) of the Act when employee Cummings and Rapoza were threatened with discharge for their participaton in protected concerted activity.

However, I dissent from my

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[4]In view of the Administrative Law Judge's finding, with which I agree, that Pacheco was engaged in protected activity when he distributed certain leaflets, I find it unnecessary to consider whether, as a union official, Pacheco had a higher duty to uphold the contract, as asserted by Respondent. Such an inquiry is relevant only where an employee is engaged in unprotected activity. See my dissent in Gould Corporation, 237 NLRB No. 124 (1978).

colleagues' adoption of the Administrative Law Judge's findings with respect to employees Drolet and Moniz. In my view, since there is no direct evidence that Respondent knew of either employee's protected concerted activity, the General Counsel has not established a key element of his prima facie case. While the inconsistencies in Respondent's defense are cause for suspicion, the absence of an element of the General Counsel's case makes it unnecessary for Respondent affirmatively to rebut the evidence presented by the General Counsel. Accordingly, inasmuch as the General Counsel has not sustained his burden of proof as to this aspect of the case, I would dismiss the complaint allegations concerning the discharge of employees Drolet and Moniz.

Dated, Washington, D.C. February 21, 1980

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John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all parties had the opportunity to present evidence, it has been decided that we violated the Act. We have been ordered to post this notice. We intend to carry out the Order of the Board and abide by the following:

The National Labor Relations Act, as amended, gives all employees the following rights:

To engage in self-organization
To form, join or help unions
To bargain collectively through a representative of their choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any and all these things.

WE WILL NOT fire or otherwise discipline any employee for engaging in concerted activities protected by Section 7 of the Act, and WE WILL NOT fire or otherwise discipline employees to discourage union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the

exercise of the rights guaranteed in Section 7 of the Act.

WE WILL offer to take Kenneth Pacheco, Richard Drolet, and John Moniz back at their old jobs or, if those jobs no longer exist, substantially similar jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL pay them for any wages lost, with interest, during the period of their discharges.

PIONEER FINISHING CORPORATION
- - - - - - - - - - - - -
(Employer)

Dated ----- by ---------- -----
Representative Title

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 12th Floor, 99 High Street, Boston, Massachusetts 02110, Telephone 617-223-3313.

JD-365-79
Fall River, MA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PIONEER FINISHING CORPORATION	Cases Nos. 1-CA-14,495-1 1-CA-14,495-2 and 1 CA-14,526
and	
KENNETH PACHECO, an Individual	
and	
RICHARD M. DROLET, an Individual	
and	
JOHN MONIZ, an Individual	

Ronald S. Cohen, Esq., of Boston, Massachusetts, for the General Counsel.
Emily J. Novick, Esq. (Doyle, Playter, Novick & Berkin), of Dorchester, Massachusetts, for the Charging Parties.
Steven D. Ostrowsky, Esq., of East Longmeadow, Massachusetts, and Henry D. Marzilli, of Providence, Rhode Island, for the Respondent.

DECISION

BERNARD RIES, Administrative Law Judge: These consolidated cases were tried on December 4-6, 1978, in Boston, Massachusetts, and on January 29-30, 1979, in Fall River, Massachusetts. Presented for resolution are allegations that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Kenneth Pacheco on May 5, 1978, Richard Drolet on May 12, 1978, and John Moniz on May 17, 1978, and that Respondent violated Section 8(a)(1) by statements made to employees in February, March, and May 1978.1/

For the reasons given below, and based on my recollection of the witnesses, my study of the record, and consideration of the briefs filed by all parties, I reach the following findings and conclusion.2/

1/The pleadings establish the appropriateness of the assertion of jurisdiction by the Board in this case; they also authorize a conclusion that the Union involved here, Local 1057, Textile Workers Union of America, AFL-CIO, is a labor organization within the meaning of the Act.

2/ I correct the transcript of proceedings as follows:

Page	Line	Change	To
47	10	is not	is
124	15	enforced?	in force.
379	5	Paul	Powell
641	17	2nd	17th
723	7	take	taking
768	7.5	------	A. No.

I. The Discharge of Kenneth Pacheco

Respondent operates a textile dyeing and finishing business in Fall River, Massachusetts, where it employs about 140 workers. It has recognized the Union as the bargaining representative of its production and maintenance employees since around 1955.

In late 1977, the parties bargained for a collective contract to replace the one then expiring. Agreement--or at least ostensible agreement--was reached in November, and the new wage rates, together with other increased benefits, became operative at that time. However, not until around April 1978 was the contract finally put into written form by Henry D. Marzilli, Respondent's labor relations representative, who had undertaken to perform that task.

Employee Kenneth Pacheco, who had begun employment in 1973, was elected Shop Chairman of the Union at Respondent's plant in May, 1977, and he participated in the negotiations in the fall of that year. When Pacheco saw the contract prepared by Marzilli, he noted that it omitted provision for a health and safety committee which, Pacheco thought, had been agreed to by the parties.

Pacheco spoke to the Union's general manager, Kenneth Dufault, about the omission. Since Dufault had only recently assumed his position, and was not familiar

with the 1977 negotiations, he consulted Respondent's representatives. The latter ultimately took the position that there had been no agreement to include the health and safety clause, and told Dufault that the Company had only agreed to informally establish a safety committee on a trial basis. Although the timing of Dufault's actions is not clear from the record, at some point he spoke to the other Union negotiators and concluded that, as he testified, Respondent had not agreed to inclusion of the clause.

It would seem that Dufault (who testified under subpoena by Respondent) had not reached the foregoing conclusion by early May, the significant time period here, since, at Pacheco's urging, Dufault scheduled a membership meeting for Sunday, May 7. Dufault testified that the purpose of the meeting was "[t]o discuss taking action" with regard to the clause, and further stated that, as of May 7, the question whether the clause was to be included in the contract "was a matter of dispute as far as [he] was concerned."

Respondent operates on three shifts, although not all departments maintain a three-shift schedule. Pacheco regularly worked the first shift, from 7:00 a.m. to 3:00 p.m. On May 2, he decided to distribute to employees on the second shifta leaflet pertaining to the health and safety issue. The leaflet had been drafted by two orthree other employees, with Pacheco's consultation, but his was

the only name shown on the document, with the title "Shop Chairman" appearing below his name.

Pacheco entered the plant at about 7:00 p.m., and first sought out George Cummings, a shop steward who had helped prepare the leaflet and who was then performing some overtime work. Pacheco asked Cummings if the latter wished to accompany him in distributing the leaflets; Cummings accepted the invitation.

The two went to a location on the first floor of one of Respondent's several conjoined buildings. Pacheco and Cummings testified that they entered the office of David Querim, the foreman in that location, showed Querim the leaflet, and received permission, tacit or otherwise, to pass out the leaflets. 3/ Querim

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3/ The versions of the two employees differed. Pacheco said that when Querim read the leaflet, he said that he agreed with it "100 percent," after which Pacheco told Querim that the two were going to hand the leaflets out to the employees "and [Querim] nodded in the affirmative;" Pacheco assertedly further asked and received permission for Cummings to accompany him to the fourth floor for additional distribution when they had finished distributing on the first floor. Cummings testified that Pacheco handed Querim the leaflet and asked "permission to pass it out;" when Querim had looked at it for a few seconds, he said "Yeah. Okay." After this, Cummings asked Querim "[C]an I go with [Pacheco]?", and Querim said "Sure."

testified that no permission was asked. He said that he saw Pacheco (alone) enter the department and hand out a few leaflets before coming to his office. Pacheco then entered the office and, handing him a leaflet, asked what Querim thought; Querim replied, "It seems to be pretty good." Pacheco then left the office and passed out leaflets to the remaining employees in the department.

Pacheco and Cummings testified that they proceeded to the 4th floor of an adjoining building where William Querim, David's father, was the foreman on duty. Pacheco and Cummings said that Pacheco handed Querim a leaflet; the latter jokingly asked "Ken, you causing trouble again;" and Pacheco proceeded to hand out the leaflets to employees in that location. William Querim could recollect little about the incident: he "might have said something" to Pacheco, and Pacheco "probably" said something to him, but he did not remember; and he did not "recall" seeing Cummings.

The distribution of leaflets on each of the two floors took no more than 10-15 minutes.

On May 5, Respondent's president Thomas Melucci handed Pacheco a letter announcing the suspension of Pacheco pending review. The leter assigns several reasons for the suspension. Point 1 states that Pacheco distributed the letter without "prior clearance with management," and then refers to a provision in the

bargaining agreement establishing the Union's right to post "official notices" on bulletin boards; this provision does not in fact, require "prior clearance with management." 4/ After emphasizing that the contract provision restricts the publication of "official notices" to posting on bulletin boards, and noting that Pacheco is a Union official, this point ends with a statement contradicting the implications of the preceding comments: "Also, we have no indication that this circular is an official notice of the Union."

Point 2 of the letter asserts a violation of the "purpose and scope" clause of the bargaining contract, which recites several general objectives of the agreement, including "to maintain a harmonious relationship between the Union and the Company." The letter contends that the circular "does not contribute to his harmonious relationship and contains libelous, misleading, false and inflammatory statements." The basis for this claim is then specified in detail, as discussed infra.

This seems an appropriate juncture at which to describe the leaflet, which is attached as "Appendix A" hereto. Titled

4/ The clause reads: "Bulletin Boards: The Employer agrees to provide space on its bulletin board for the posting of official notices relating to Union meetings and other union affairs."

"Fight For Safety Now . . . Before It's Too Late," the leaflet first asserts that Respondent's plant "is a dangerous place to work," as is shown by "we Pioneer workers who face these dangers day in and day out." It then states:

> In 1977 alone, there were 28 serious accidents resulting in 2,248 hours of lost time and wages! Which of us will be victims of these crippling accidents in 1978? How many of us risk accidents daily because of holes in the floor, falling lights, defective tructs and machinery, etc.? Only an effective Health & Safety Committee can ensure a safer future for us all.

The circular goes on to state that the union thought it had won the safety clause during the negotiations, but that now Respondent's owners were refusing to sign the agreement unless they could delete the clause from the contract and substitute a trial period for the safety committee. The leaflet charges that management wanted to forestall an effective committee because "forcing the company to fix the hazards affecting you and I is bound to cost them money," and because "the company is especially afraid of having to interrupt production in order to make these necessary repairs." The circular then claims that management desired to "control" the proposed trial committee by itself choosing the Union members to be appointed.

Finally, under the heading "What Must We Do To Force The Company To Back Down?," four courses of action are indicated: attendance at the May 7 meeting "to reject this proposal;" encouraging fellow workers to attend the meeting; notifying Union representatives of employee displeasure with the "unsafe working conditions," and of employee desire to have "the company proposal rejected;" and reporting to Pacheco any health and safety problems in the departments.

In his May 5 letter, Melucci found objectionable the reference to "28 serious accidents," which he labeled "false," pointing out that of the 28 accidents logged in 1977, 19 involved no lost work-time, 5 involved 1-6 days of lost time, and only 4 involved more than 7 days of lost time. The letter further took offense at the use of the adjective "crippling," noting that "[o]f the 4 accidents involving a long period of lost time, only 1 employee is still out." The letter then branded as "libelous" the claim that an effective committee would force the company to fix hazards and would cost the company money, pointing out that Respondent engages a safety engineer to make monthly inspections and that "the company's policy is to eliminate hazards wherever they exist without regard to cost."

The letter thereafter characterized as "false" the assertion that Respondent did not intend to live up to commitments

made during contract negotiations. Finally, the letter closed by setting out Respondent's "contention that our contract was legally in force an [sic] effect as of the time of completion of negotiations and ratification by the members and that this inflammatory circular is being used to incite workers to possible illegal acts or actions."

The Union's efforts after May 5 to restore Pacheco to employment were unavailing, and he was discharged on May 11. Subsequently, the Union took Pacheco's case to arbitration, and the Respondent prevailed before the arbitrator, a disposition which, Respondent here contends, should put to rest Pacheco's claim in this proceeding. That contention will be addressed infra.

As set out above, the principal reasons given for the discharge of Pacheco were that he had violated the bargaining agreement in several identified respects, relating to the fact or manner of distribution of the leaflets and to their content.

It is obvious that the bulletin board clause to which the letter refers had no application to Pacheco's activity, and he could therefore not rationally be thought to have "violated" that provision. If a liberal construction be given to the claim of "violation," it might amount to an argument that the Union, by contract, waived all Section 7 distribution and

solicitation rights of employees aside from those expressly preserved in the agreement. The Board, however, in a broad reading of N.L.R.B. v. Magnavox Co., 416 U.S. 952, has held that a union is not empowered to make a waiver of any such rights. Ford Motor Company, 221 NLRB 663, 665.

For purposes of considering all arguments, however, and because questions pertaining to the vitality of the bargaining agreement and its contents are raised at more than one point in the case, I shall discuss whether the bargaining agreement was actually in effect on May 5 and 12, 1978. That issue was litigated only rather allusively. Pacheco was obviously of the opinion that any contract which did not contain the safety committee provision did not reflect the agreement of the parties. Pesident Melucci, on the other hand, testified that the negotiators had decided "to try the contract." Union general manager Dufault appeared to have reached a similar conclusion as to the status of the clause after consulting other Union representatives, although he was not in a position to present any direct testimony on the question.

The evidence indicates that a contractual wage increase and other new benefits were put into effect in November 1977; on the other hand, Dufault testified to certain changes in the typed agreement to which Respondent's negotiators acceded before the contract was finally signed.

Furthermore, the January 8, 1978, minutes of the Union's Joint Board, put into evidence by Respondent, state that the Union general manager reported that the Pioneer contract had been ratified and "that the formality of actually signing the contract [] would be done after final details were worked out on them as is per our usual practice." That signing took place, according to Dufault, some time in August or Septmeber 1978. While Melucci initially testified that he probably signed the agreement in the first 3 months of 1978, 5/ he later said it was "possible" that he had not signed as of May. The contract contains signature spaces for the Union, the Respondent, and the "Negotiating Committee;" only the first two blocks were signed as of the time of the hearing.

These sparse facts leave room for debate whether the agreement was operative as of May 1978. Even if Melucci were to be credited in his testimony that the safety clause had been shelved, the question remains essentially unlitigated whether the parties understood that the contract was to take complete effect in the absence of a written agreement. The fact that increased benefits were given in November suggests that there was to be no such delay; the fact that there were matters other than the safety clause which had to be further negotiated suggests that

5/ The signature blocks do not disclose the dates of signing.

there might have been a contrary view held by the parties.

Assuming the effectiveness of the agreement, however, it provides no warrant for the actions assertedly taken in its name. Confining discussion now to the face of Melucci's May 5 letter, the "bulletin board" clause relied upon plainly does not, as previously stated, prohibit Pacheco from passing out leaflets. Not only does the clause not refer to "prior clearance with management," as Melucci's letter seems to indicate, but it has nothing to do with distribution of unofficial literature, and Melucci testified that his pre-discharge investigation disclosed that the leaflet was "not an official notice from the Union."

The only other provision of the agreement which possibly relates to Pacheco's activity is one called "Access to Premises." 6/ While Melucci did not

6/ "A representative or representatives of the Union shall have access to the plants of the Employer for the purpose of adjusting grievances, negotiating the settlement of disputes, investigating working conditions and generally for the purpose of carrying into effect the provisions and aims of this agreement. He shall made an appointment in advance for such visits. In any event the representative of the Union shall on arrival at the plant clear through the regular channels of the Employer for receiving visitors and may be accompanied by a representative of the Employer on any visit into the plant."

cite this clause in his May 5 letter, it may be Respondent's position that this clause, together with the "bulletin board" provision, impliedly constituted a concession by the Union that, outside of these privileges expressly enumerated in the contract, the Union agreed to waive any other rights pertaining to solicitation, access, or distribution which might be afforded employees by Section 7 of the Act.

As previously stated, the Board has held that unions are unauthorized to make such waivers. Furthermore, the cases make clear that a union will not be held to have surrendered the statutory rights of employees in the absence of "a clear and unmistakable showing of a waiver of such rights," Tide Water Associated Oil Company, 85 NLRB 1096, 1098. There is no evidence that the negotiators discussed any such waiver; the contract itself, which contains no "zipper" or management rights clauses, does not refer to a waiver of statutory rights; and, by the standard enunciated above, there can be no merit in a claim of waiver grounded on the mere existence of the bulletin board and Union access clauses. Thus, even assuming the vitality of the contract in May 1978, there is no basis for asserting the primacy of the contract over the right to engage in Section 7 activity.

The protection given by Section 7 to employees who "engage in other concerted activities for the purpose of collective

bargaining or other mutual aid or protection" implies the right to communicate with fellow employees concerning their common working conditions. A body of regulatory principles has evolved over the years; as prescribed by the Board in Stoddard-Quirk Manufacturing Co., 138 NLRB 615, an employer may publish and enforce presumptively valid rules forbidding employees from engaging in union solicitation during working time (but not, ordinarily, during nonworking time) and from engaging in distribution of literature during working time and in working areas of the plant (but not, ordinarily, during nonworking time and in nonworking areas).

The distribution by Pacheco on May 2 was the sort of conduct as to which an employer could promulgate a presumptively valid restriction. Pacheco passed out the leaflets both in the working time of recipients (although not his own) and in working areas of the plant. The fact is, however, that there was no rule in effect barring such activity. As found above, the contract did not, and perhaps could not, amount to a waiver of the right to engage in solicitation and distribution. The record shows that Respondent has never issued written or oral rules prohibiting solicitation or distribution. While Melucci testified that he had repeatedly cautioned Pacheco about not entering areas of the plant other than his own without obtaining permission, "the gist" of these admonitions was, as Melucci testified, that Pacheco was to "seek permission of

his foreman before he leaves his job to seek out union maters." In the present case, of course, Pacheco was not "leav[ing] his job" in distributing the leaflets on May 2.

The Board has taken an expansive view of the right of employees to engage in concerted activities in the absence of a clear rule tailored to the contours of the law. Thus, in Daylin, Inc., Discount Division d/b/a Miller's Discount Dept. Stores, 198 NLRB 281, enfd. 496 F.2d 484 (C.A. 6), two employees were discharged for "admittedly soliciting union support during working time." Because the no-solicitation rule invoked by the employer was overbroad, however, the Board held that the discharges pursuant to it were unlawful, and announced the following doctrine (198 NLRB at 281):

> The Chairman's view appears to be that, because the employer may in a presumptively valid way limit solicitation, there can be no interference with employees' rights by discharging them for soliciting on worktime. The correct view, however, is that any prohibition of solicitation, by rule or discipline, interferes with employee rights, and that such interference must--in the absence of a valid rule--be supported by an affirmative showing of impairment of production.

No showing of impairment of production was made in this case (and, indeed, Melucci's May 5 letter did not rely on any such impairment). Nor can I perceive any

basis for distinguishing between simple solicitation by one employee of another while both are on working time, as in Daylin, and the dissemination of literature by an off-duty employee to working employees, as in this case; the Daylin analysis would seem to apply with equal force to distribution in work areas where no presumptively valid plant rule forbids it.

The record, indeed, strongly negates any employer concern with the distribution of literature in work areas on working time, and, in point of fact, reflects a tolerance of such behavior. Pacheco testified that on a number of occasions between December 1974 and July 1977, he had, while off duty, and with the knowledge of suprvisors, passed out to working employees literature pertaining to intramural Union affairs. Although Pacheco testified that he had not secured permission to engage in such distribution, Melucci stated that Pacheco had asked for approval in 1974 and 1976 to hand out election materials, and that such approval had been granted. Melucci said that he had also granted permission for such distribution to other union officials who wanted to hand out election materials and further stated, "It's always been the past practice of the Company to grant permission when asked to hand out leaflets...."

The question of whether or not Pacheco had previously requested

permission for such distribution is irrelevant to the issue under discussion, although I would be inclined to credit Pacheco in this regard. What is of interest here (although, in the absence of a valid rule barring distribution, it is not material) is that Respondent's prior policy of allowing intraunion materials to be distributed by off-duty employees and nonemployees to working employees evidenced a lack of concern on Respondent's part that such dissemination might have any disruptive effect on production. 7/

7/ Although the leafletted employees probably stopped to read the 1 page broadside given them on May 2, testimony by supervisor William Powell indicates that such breaks are accepted: "[O]ff and on during the day, I see two or three talking, yes, for maybe two or three minutes, and then they are gone." The record also contains testimony by employee Thomas Vining, only vaguely denied, that prior to May 2, and in the presence of supervisors, certain religious organizations sold candy, and Girl Scouts sold cookies, to employees engaged in work. Robert Pacheco, unrelated to Kenneth, testified that, although a nonemployee, he had accompanied Kenneth through the plant handing out literature several times, being introduced to foremen along the way, and on one occsion, by himself, went through the plant passing out leaflets, without hindrance. Although this testimony is not easily subject to refutation, Robert pacheco was an impressive witness.

It next seems appropriate to consider whether Pacheco's off-duty status is a pertinent actor here. In GTE Lenkurt, Incorporated, 204 NLRB 92, 922, the Board (then-Member Fanning and Member Jenkins dissenting) held that where an employer promulgates a no-access rule which is "non-discriminatory, i.e., it denies offduty employees access to the premises and is not disparately applied against union activities, it is presumptively valid absent a showing that no adequate alternative means of communication are available." In the present case, Respondent has not maintained any "no-access" rule pertaining to off-duty employees, and in fact has permitted them, as well as nonemployees, to enter the premises and engage in distribution to working employees. The Board's appraisal in Lenkurt that an offduty employee's "status is more nearly analogous to that of a nonemployee, and he is subject to the principles applicable to nonemployees" seems intended to be operative only when an employer has established a rule barring off-duty employees from entering the premises)"...whether, notwithstanding an employer rule to the contrary, [an employee] has a right to enter or remain on an employer's premises if he wishes to do so for this purpose"). (204 NLRB at 921, emphasis added.) 8/

8/ Even if one could assume that there was a ad hoc "rule" in existence, arising out of Melucci's claim that he had always granted permission for incursions by off-duty employees, the Board would consider a rule of such narrow reach to be invalid. M Restaurants, Incorporated, d/b/a The Mandarin, 221 NLRB 264; Barney's Club, Incorporated, 227 NLRB 414.

I conclude, accordingly, that insofar as the discharge of Pacheco was based on the manner in which he distributed the leaflets, that discipline constituted an abridgement of his Section 7 rights,

It seems debatable whether it is necessary to consider the protected nature of the content of the May 2 leaflet. Since Pacheco was terminated in part, as Melucci's leter states, because he made the distribution at a time and in a manner which Section 7 safeguards, it may be argued that such partial causation suffices to make out a violation. 9/ However, since the claim that the leaflet "contains libelous, misleading, false and inflammatory statements" may relate to the proper remedy as well as to the question of a substantive violation, and since it seems most improbable that the discharge would have occurred had it not been for the wording of the leaflet, as counsel for General Counsel convincingly argues, further analysis is in order.

In El Mundo Broadcasting Corporation, 108 NLRB 1270, 1278-79, the Board held

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9/ "It follows, therefore, that since the arbitrator found that Richardson was partially discharged for writing and distributing the handbill, the effect of his findings is to uphold a discharge for engaging in protected activities." Pincus Brothers, Inc. - Maxwell, 237 NLRB No. 159.

that inaccurate and defamatory statements uttered in the course of otherwise protected activity cause that activity to forfeit the protection of the Act only if the remarks are "deliberately or maliciously false." Accord, Walls Manufacturing Company, Inc., 137 NLRB 1317, 1319, enfd. 321 F.2d 753 (C.A. D.C.); OwensCorning Fiberglas Corporation, 172 NLRB 148, 155, enfd. 407 F.2d 1357 (C.A. 4). In Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 62, the Supreme Court held the following language to be an appropriate standard in a labor dispute (there, in the context of a libel suit): "[T]he Supreme Court held the following language to be an appropriate standard in a labor dispute (there, in the context of a libel suit): "[T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth."

Melucci's May 5 letter took umbrage at four passages in the May 2 leaflet. As will be recalled, the leaflet stated, 'In 1977 alone, there were 28 serious accidents resulting in 2,248 hours of lost time and wages! Which of us will be victims of these crippling accidents in 1978?" Employee Richard Drolet testified that the cited figures were taken by him from a posted notice summarizing injuries and illnesses for 1977. 10/ The notice,

10/ The hours of lost time were computed by multiplying the number of lost days by 8 hours.

which is in evidence, does not characterize the 28 occupational injuries as "serious" or otherwise; the only breakdown is by classifications of "deaths" (0), "total lost workday cases" (9)," cases involving days away from work" (9), "days away from work" (281), "days of restricted work activity" (0), and "nonfatal cases without lost workdays" (19).

Melucci's May 5 letter offers an analysis as to why the 289 accidents should not be considered "serious." Evidence on the issue was presented at the hearing only in the form of a more detailed record kept by Respondent for the Occupational Safety and Health Administration. That document shows that 9 of the 28 accidents recorded in 1977 caused the following loss of workdays: a back injury - 210 days; a head injury - 2 days; an internal injury - 9 days; a swollen knee and ankle - 2 days; a cut finger - 6 days; a back injury - 3 days; a strained back muscle - 5 days; a pulled muscle - 43 days; and a back injury - 1 day. 11/

I myself would not objectively clasify these 28 accidents as "serious." Whether an employee working at the plant could justifiably do so is another question. Similarly, I would not consider most of these accidents to have been

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11/ The other injuries, which sound potentially harmful (e.g., "chemical burn," "sprained ankle," "back strain"), caused no loss of workdays.

"crippling," in the common acceptation of that word; but, assuming that the word "crippling" was intended to embrace all 28 accidents (as to which ther eis room for argument), I cannot conceive that Pacheco intended the recipients of the leaflets to take literally--nor do I believe that they did--that 28 employees had been "crippled" in 1977. Obviously, if that many employees in a unit of 140 had been "crippled," the others would have been aware of this catastrophe in their ranks; Melucci agreed at the hearing that the employees themselves "would know whether or not" Pioneer was a dangerous place to work, although he then argued that a statement by the Shop Chairman would be influential.

It seems to me, in short, that the remarks about the nature of the 28 injuries were not objectively factual and were not intended to be taken as "representations of fact;" they were, rather, mere "rhetorical hyperbole," Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264, 284, 286, understood to be so by the readers of the leaflet. Compare Great Lakes Stell, Division of National Steel Corporation, 236 NLRB No. 115, where the leaflet in question several times accused the company of "murder;" and Greenbelt Cooperative Publishing Assn v. Bresler, 398 U.S. 6, 14.

Pacheco, an employee of 5 years' tenure, had the right, I think, to consider each accident a "serious" one;

the difference between a burn which causes loss of one day's work and one which results in permanent disability may be nothing more than one second in time or a fortunate reflex. While every accident was not a "crippling" one, Pacheco both knew that and further knew that the other employees shared his knowledge. Pacheco was surely no fanatic, 12/ but he was, as clearly, vitally interested in an important condition of employment. The zealous and dramatic expression of his concern does not deprive him of the Act's protection. 13/

The suspension letters also complained of the following passage from the leaflet: "After all, an effective Health & Safety Committee forcing the company to fix the hazards affecting you and I is bound to cost them money." Although Melucci's letter states that the Respondent has monthly safety inspections by its insurance company and complies with all recommendations, there was no testimony on this point. Some evidence that this alleged system is not impeccable

12/ Fanaticism consisting of, according to Santayana, "redoubling your efforts when you have forgotten your aim." The Life of Reason, Vol. I.

13/ Indeed, as counsel for General Counsel points out, Respondent failed, in attempting to show malice on Pacheco's part, to elicit any evidence from Pacheco as to his knowledge and assumptions about the 1977 safety record.

is found in citations issued by OSHA against Respondent in August 1978, one finding "serious" violations of regulations at 10 places in the plant, and the other listing a total of more than 40 "other" violations. 14/ The assertion in the leaflet that the Respondent's fear of increasing costs lay behind its opposition to a safety committee is part of the traditional stuff of labor disputes. Compare, again, Great Lakes Steel, supra, where similar rhetoric was employed: "This is murder to save profit;" "Safety, not profits, first!"

Finally, Melucci's letter objected to the underlying claim in the leaflet that Respondent did not "intend to live up to commitments made during contract negotiations," and further asserted that "our contract was legally in force an [sic] effect as of the time of completion of negotiations and ratification by the members and that this inflammatory circular is being used to incite workers to possible illegal acts or actions."

The first issue subsumed in these two statements is whether the leaflet misrepresented the results of the negoatiations. Pacheco testified that there was agreement "in principle" upon the establishment of a safety committee, with the language to be worked out, and that the employees were so told at the

14/ Respondent did not appeal these citations.

ratification meeting. Melucci testified that there was no such agreement, and Dufault testified, without objection, that his subsequent investigation led him to believe that there was not. While I would credit Pacheco on this score, I do not think the resolution of the conflict is material, for, even assuming a contrary determination, I feel certain that Pacheco did not deliberately, maliciously, or recklessly assert that such agreement had been arrived at. The record before me, and my evaluation of Pacheco, leads me to believe that, at worst, Pacheco was acting under a mistaken impression of the agreement reached; Respondent, which must shoulder the burden of disqualification, has not satisfactorily shown that Pacheco was pressing this claim mischieviously or with careless disregard of facts known to him. 15/

As earlier noted, the record is less than clear on the issue of whether the parties intended all of the agreement, including the no-strike clause, to take effect immediately upon ratification. But even assuming that they did, and also assuming, contrary to Pacheco, that they did not intend to incorporate the health and safety provision into the contract, there is no perceptible basis for _____

15/ Pacheco testified, for example, that he presented the clause at an employee ratification meeting as part of the agreement; no employee was called to contradict this, nor were the minutes of the meeting offered in evidence. Melucci gave only the most conclusionary testimony on this point, and none of Respondent's other negotiators were called to present evidence on it.

Melucci's claim that "this inflammatory circular is being used to incite workers to possible illegal acts or actions," by which Melucci meant, as he testified, a "strike issue." Although the leaflet poses the question, "What Must We Do To Force The Company To Back Down?," none of the answers given remotely indicate that a strike should be considered. Further, to the extent that Respondent argues that Pacheco was attempting to force abrogation of a ratified contract, it can as easily be said that he was trying to mount an effort for voluntary renegotiation, a perfectly legitimate objective. Timpte, Inc., 233 NLRB No. 162; N.L.R.B. v. KDI Precision Products, Inc., 436 F.2d 385, 386 (C.A. 6).

I am thus led to conclude that, in distributing a leaflet on May 2 which invited employees to join in common cause about a condition of their mutual employment, Pacheco was engaged inconcerted activity protected by Section 7 of the Act. It follows that Respondent violated Section 8(a)(1) 16/ by suspending Pacheco on May 5 and thereafter, on May 12, discharging him. The foregoing analysis has been undertaken without regard to the possibly relevant factor of Melucci's degree of personal animosity toward Pacheco's conduct, to be discussed below.

The complaint alleges that on two occasions in early 1978, Melucci made

16/ And, as well, Section 8(a)(3). Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793, 805.

statements to an employee which had the effect of coercing him in the exercise of Section 7 rights; the remarks purportedly refered, directly or impliedly, to Pacheco. Employee Jesse Ferreria testified that during an orientation interview with Melucci on February 20, 1978, Melucci "warned me about a group of radicals and troublemakers that worked at Pioneer and told me that I should stay away from them if I wanted to stay out of trouble . . . He didn't mention anyone by name. He did mention at one point that the Shop Chairman, that he considered the Shop Chairman a radical." Some 2 or 2-1/2 weeks later, according to Ferreria, Melucci approached him at work and, while inquiring about his progress, "again warned me to stay away from troublemakers and said that 'We're going to get rid of the troublemakers," but testified that he spoke similarly to all new employees whom he interviewed, and made no reference to the Shop Chairman when talking to Ferreri. He denied that the second conversation occurred.

Although Melucci made a generally honest appearance, certain aspects of his testimony were unreliable. For example, he began his May 5 letter, "On or about May 2nd and 3rd, 1978, Mr. Pacheco distributed or caused the distribution on company premises. . ." When asked about this, Melucci denied any knowledge of distribution of the leaflet on May 3. There is evidence in the record that distribution, by Ferreria and by Shop Vice Chairman David Rapoza, occurred on that date. Melucci said that he used the wording "May 2nd and 3rd" because he was,

at the time he wrote the letter, "not exactly sure" of the date on which Pacheco had passed out leaflets. That problem, of course, would have been more sensibly resolved by using "or" instead of "and," especially since "On or about" was being used to precede the phrase. Moreover, the use of "or caused to be distributed" seems plainly meant to cover the activities of May 3. It appears most probable that Melucci was fabricating this explanation, perhaps because he was uncomforable without having punished only Pacheco while having knowledge of other culpable employees.

In like measure, however, while Ferreria's demeanor was commendable, his testimony seemed to conflict materially with that given by Richard Drolet, an alleged discriminatee. Drolet testified in passing that on March 14 or 17, in the course of consulting with Melucci, the latter told him that Pacheco "used to be a troublemaker, Ken used to give us a lot of trouble, but he bought a house and now he is paying off a mortgage, and he no longer gives us any trouble." Thus, Melucci was purportedly telling Drolet that Pacheco "no longer gives us any trouble" on March 14 or 17, and also purportedly telling Ferreria within the same time frame that he "considered the Shop Chairman a radical." This is too substantial a contradiction to be ignored, and I am constrained to disregard Ferreria's testimony about the latter remark. 17/

17/ I further note that Ferreria's pretrial affidavit makes no reference to Melucci specifying that the Shop Chairman was one of the "radicals."

A similar disposition of the comment made 2 weeks later -- "We're going to get rid of the troublemakers, union or no union" -- is in order, but even if it was made, I question whether it was violative. Here, Melucci is not said to have attributed any illicit connotation to the word "troublemakers," and his asserted vow to eliminate them despite possible opposition from the Union does not suggest that those who ally themselves with the Union will suffer by doing so. I find, accordingly that Melucci did not offend the Act in either alleged conversation.

There is room for argument in this case, over and above a simple application of legal princples relating to an employee's Section 7 right to distribute literature, that Melucci's decision to discharge Pacheco was animated by a desire to retaliate against Pacheco's aggressive performance of his duties as Shop Chairman. Pacheco testified, without contradiction, that he had often complained to Melucci about working conditions during the year in which he had served as Chairman. The evidence, as set out below, suggests that Pacheco may have been treated disparately about this distribution issue.

Melucci testified on May 2, Pacheco had been seen in the company of George Cummings "by Mr. David Querim who did not see Mr. Pacheco actually handing the leaflets to the employees." David Querim, on the other hand, contradicted both of these factual assertions, testifying that he did <u>not</u> see Cummings with Pacheco, but

that he did see Pacheco pass out leaflets. I am inclined to believe that Querim did see Cummings, and so told Melucci. 18/ Further, based on the suspicious opening sentence of the May 5 letter, as previously discussed, I deduce that Melucci was aware that there had been distribution by Ferreria and David Rapoza on May 3. This conclusion is supported by the testimony that on May 5, supervisor Robert Kitchen told George Cummins that he had "better go to a lot of novenas, because if Pacheco -- Pending further investigation, if Pacheco went, me and Dave Rapoza would be next." 19/

18/ Querim, asked whether he had testified at Pacheco's arbitration that he had seen Cummings, said that he did not "recall," but refused to say flatly that he gave no such testimony. This obviously allows an interference that he saw Cummings.

19/ The complaint alleges this statement to be violative of Section 8(a)(1). Kitchen substantially conceded the remark, saying that he told Cummings, "I'm sure you know everyone knows that you were one of the people that passed out the pamphlets. . .If you're worried about the job, I'd say a couple of novenas." I credit the version given by Cummings. It would seem that the lawfulness of the remark, the coercive thrust of which is the announced peril to the jobs of Cummings and Rapoza, depends initially on whether the distribution by them, in contradistinction to the distribution by Pacheco, was statutorily protected. That question was (continued)

The foregoing indicates that Melucci treated Pacheco differently from others who had participated in the distribution. There was not much emphasis on this point at the hearing, however, and Melucci was never asked why he did not also punish Cummings and Rapoza. Two obvious distinctions are that Pacheco's name appears on the pamphlet, and he was patently at the helm of the venture. See Chrysler Corporation, Dodge Truck Plant, 232 NLRB No. 74. While the evidence here discussed may be sufficient to establish that Pacheco was singled out for discipline on the basis of his past protected conduct, 20/ I see no need, in view of my primary conclusions, to so find. 21/

19/ (continued) not expressly explored, and I need not examine it here. The fact is that the limited warning -- that something might happen to the two employees, based on their past activity -- was predicated on a precondition -- the discharge of Pacheco. That precondition was quickly accomplished, and it soon was apparent to Cummings that neither he nor Rapoza were to be punished for their roles in the activity of May 2 and 3.

20/ Contrary evidence may be found in Drolet's report that in March, Melucci no longer considered Pacheco to be a troublemaker.

21/ I also see no merit in Respondent's argument that Pacheco's position as a union official imposed some higher duty upon him.

Not long after Pacheco's discharge, general manager Dufault, Pacheco, and Respondent agreed to submit the issue of the propriety of the discharge to an arbitrator, outside of the regular arbitration procedure set out in the contract. The arbitrator, a staff mediator for the Massachusetts Board of Conciliation and Arbitration, concluded that Pacheco had been "justifiably discharged." Respondent now urges that deferral to the arbitral decision is appropriate under the doctrine of Spielberg Manufacturing Company, 112 NLRB 1081.

In Spielberg, the Board held that it would honor a private arbitration award disposing of a controversy before the Board if "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the [arbitrator] is not clearly repugnant to the purposes and polices of the Act." 112 NLRB at 10892. A further showing must be made that the arbitrator considered and resolved the underlying unfair labor practice issue. Raytheon Company, 140 NLRB 883, enf. den. 326 F.2d 471 (C.A. 1); Oakland Scavenger Company, 241 NLRB No. 1, sl. op. p. 2, n. 1.

The first two Spielberg criteria were

probably satisfied here. 22/

22/ The fact that the arbitrator did not allow proposed witnesses for Pacheco to testify about safety conditions at the plant does not necessarily indicate that the proceeding was less than "fair and regular," although a reasonable argument to that effect could be made. At one point in his decision, the arbitrator seemed to regard the issue as whether "Pioneer was an unsafe plant," which, if so, would make material the excluded testiony. His primary reliance, however, appears to be on his conclusion that the 1977 plant safety record was distorted. Furthermore the arbitrator did permit the employees to submit written statements, which his decision then held were irrelevant to the issues before him.

Even if it were true that, as Pacheco testified, the arbitrator told him that he had to sign the submission agreement which included a finality provision, in order for the arbitration to "go forward," that would not infect the proceeding; Respondent would be entitled to demand such a concession. The arbitrator testified that, to the contrary, he told Pacheco that he did not have to sign the agreement, and I credit his testimony. I do not believe, however, that Pacheco was attempting to lie about this unessential matter, especially in view of the fact that he knew the arbitrator could be called to rebut such testimony; I think, rather, that Pacheco, an admirable witness, mistook the import of the arbitrator's remarks.

I do not believe, however, that the third standard was met.

Briefly summarized, the arbitrator's decision rests upon princples of arbitral jurisprudence and articles of the bargaining agreement to conclude that Pacheco's discharge was justified. He finds that Pacheco passed out the circulars in the plant "without permission" and without authorization from "the Union General Manager [or] the assembled Union membership," and that this conduct was contrary to "Article I, and Article II, Sections (D) and (E)" of the bargaining agreement. He further concludes, based on the actual facts pertaining to plant injuries in 1977, that Pacheco "grossly exaggerated, with the intent to deliberately mislead," Respondent's safety record, and "damned the management of the plant, impugned their integrity and attempted in a very serious way to destroy any 'harmonious relationship. . . '." He terms "clearly too much" Pacheco's refusal to repent his conduct. The decision does refer to the concept of "protected activity," but the arbitrator defines that term in a sense totally at odds with the statute, and his statement of the issue presented indicates that he felt confined solely to contractual questions: "The issue before me was not whether certain employees thought unsafe conditions existed, but whether Pacheco exceeded the Contract in doing what he did" (emphasis in original).

The earlier analysis of Pacheco's

rights under the Act concludes, on basically undisputed facts, 23/ that the discipline of Pacheco violated his statutory right to engage in concerted activity. The arbitrator nowhere conveys an awareness of the statutory principles implicated in such an issue, and his decision, in my view, abridges those principles. Member Truesdale wrote, in his concurring opinion in The Kansas City Star Company, 236 NLRB No. 119: "[The Board] examines the arbitrator's legal conclusion to see if, on the facts he has found, it is consistent with Board law. Finding that it is, and that the arbitrator actually considered Board law in ruling . . . the majority defers to the arbitrator's decision." Since I conclude that the disposition made by the aribtrator was not consistent with the determination the Board would make, I believe that deferral is not appropriate in this case. Dreis & Krump Manufacturing, Inc., 221 NLRB 309, 314,

23/ The arbitrator discredited Pacheco's testimony that he obtained permission from David Querim to distribute the leaflets. While I would conclude that permission was at least tacitly sought and given, I believe that the issue is irrelevant to the legal issues here. In no other respect does it appear that the primary facts are in dispute; the arbitrator's conclusion that Pacheco "grossly exaggerated, with the intent to deliberately mislead," Respondent's 1977 safety record, is, so far as the record shows, a legal inference based on Respondent's explanation of the 1977 accidents, and takes no account of the materiality, or lack thereof, of the exaggerations, or of Pacheco's true state of mind.

enfd. 544 F.2d 320, 330 (C.A. 7); Pincus Brothers, Inc.-Maxwell, surpa.

II. The Discharge of Richard Drolet

On May 12, the day after the discharge of Pacheco became final, Respondent discharged Richard Drolet, and soon thereafter, on May 17, terminated John Moniz. Both employees were in their probationary period. The General Counsel asserts that the work-related reasons for the discharges proffered by Respondent are sham, and that the two were fired for, inter alia, protesting the discharge of Pacheco (and, as to Moniz, for having, in addition, protested the interim discharge of Drolet).

Drolet was first employed by Respondent on February 6, 1978. He worked as a tuber inspector until around March 9, when he was discharged. He grieved his discharge, and Melucci relented. Drolet returned to work as a new employee on a new probationary period, on March 20, this time as a beck operator.

The concerted activities relied upon by General Counsel as the true cause of Drolet's second discharge on May 12 are set out below. Drolet testified that he was involved in drafting the May 2 leaflet, but that was done at an employee's home, and there is no reason to believe that Respondent's agents were aware of his asserted role. Drolet testified that after Pacheco was suspended on May 5, he had conversations with other employees at work protesting the discipline

and suggesting "some kind of job action" if Pacheco was not reinstated; there were "[p]robably around five to ten [such conversations] in that instance, too; maybe more. I don't know." He also discussed with fellow employees "[m]aybe five to ten different times" before the May 7 Union meeting the importance of a large attendance at that meeting. At the meeting, according to the testimony of several employees, the subject of Pacheco's suspension replaced the safety clause as the topic of discussion, and Drolet, arguing that the contract was not in force, told the employees that they had the right to "pull some kind of job action" to protest Pacheco's suspension. An estimated 40-60 employees attended the meeting, and employee Timothy Reid testified that at least 16 of them spoke out about the treatment accorded Pacheco. There is no direct evidence that Respondent's officials became aware of what happened at the meeting.

Respondent's explanation of the second discharge of Drolet was simply that he made too many errors. As a beck operator, Drolet's job consisted of dyeing cloth by running it through a large vat. Over him were three levels of supervision, all somehow involved in his discharge: Robert Kitchen, who supervised a total of around 7 employes on the third shift (11:00 p.m. - 7:00 a.m.) of the beck dyehouse; William Powell, superintendent over all three shifts of the beck dyehouse; and president Melucci.

As narrated by Powell, who worked

day-time hours and therefore not coincidentally with Drolet and Kitchen, 2-3 weeks after Drolet began his second employment, Powell was told by an employee on the first shift of some red stains on a batch of goods dyed the previous evening. He investigated, discovered that Drolet had handled the dyeing of the cloth, concluded that the stains had een caused by Drolet having failed to properly line the box into which he deposited the cloth after dyeing it, informed Kitchen to warn Drolet to take more care, and later followed up to ascertain that Kitchen had cautioned Drolet. Powell said that rehandling of the damaged goods required 6-8 hours of work. 24/

About 2 weeks later, said Powell, the same sort of error was brought to his attention, involving some 2,000 yards of cloth; the stains on 1,300 yards were adequately rehandled, but 700 yards had to be dyed black. The same warning procedure outlined above was followed.

There followed, in the same week, an identical staining error, which was capable of being completely corrected. Powell said that the delayed warning, followed by his verification, was again given by him to Kitchen and thence to Drolet

The fatal error, said Powell, occurred on May 10. Drolet, as he

24/ It appears from the transcript that Respondent keeps no written records of such errors (Tr. 88-89).

conceded, failed to add 100 pounds of salt to a batch being dyed. When a test of patch in the early part of the process disclosed that the color had not adhered to the cloth, Kitchen told Drolet to add the salt. Powell testified that Kitchen told him about the omission having occurred, and the possibility of streaks being caused thereby, and after the cloth had dried, Powell saw that the damage had eventuated. Correction of the error required about 8 hours.

Powell testified that he spoke to Melucci on May 10, in the course of a routine meeting, and recommended that Drolet be discharged. Melucci said he wanted to think it over. The following day, May 11, Melucci, having spoken to Kitchen about Drolet's work performance, authorized Powell to discharge Drolet. That evening, Powell called Kitchen at the plant and told him to have Drolet wait after the shift ended the next morning. At that time, Powell says, he told Drolet that he was being let go because of his production errors.

Powell was, personally, an unusually impressive witness. At the hearing, even after noticing that certain portions of his testimony seemed questionable, I was, when he had completed his appearance, prepared to believe him. After a very thorough study of the record, however, I find many inexplicable discrepancies in Powell's testimony, Melucci's testimony, and Kitchen's testimony. Together with admissions by Kitchen, and evidence

presented by General Counsel, these factors lead me reluctantly to believe that I must discredit Powell. I hope that I do him, Kitchen, and Respondent no injustice in so concluding.

The most noticeable discrepancy is Kitchen's contradiction of Powell on a key point--the number of errors made by Drolet. Powell at first testified that only two staining incidents and the salt incident occurred, and agreed that these were "the only incidents that [he] based his decision on." When shown his pretrial affidavit, however, alluding to three stain problems, he corrected himself and said there were indeed three stain problems, and that he had so stated previously; the record shows that he had not. Thereafter, he described the third stain incident, and recalled speaking to Kitchen, telling him, "I had to have more control over the men on that shift than he had, and he had to inform Mr. Drolet that he had to be careful unloading boxes." He also followed up on this, speaking to Kitchen "the next day" "in [Powell's] office," at which time Kitchen told Powell that Kitchen "had informed [Drolet] that he had to be more careful, it had happened three times and. . . he went over it again as far as lining the boxes and that he had to be more careful."

As earlier noted, Powell testified that he followed this same communication and verification procedure on each of the three stain occasions. The problem here is that Kitchen made it quite clear that

there was a total of only three Drolet errors" "[t]wo stains and the omission of salt." In view of the obvious discomfort which the discharge of Drolet caused Kitchen, as we shall later see, it seems quite unlikely that he would have forgotten so much about the discharge by December, when he testified, that he could not have recalled a third staining incident in which he pointed out to Drolet that "it had happened three times;" but if he could not recall it, how could Powell remember Kitchen recounting to him that he had warned Drolet "it had happened three times?"

I recognize that, at least, this divergence indicates that Kitchen and Powell did not try to conform their testimony on this point (Kitchen testified the day after Powell); this is a favorable factor which might allow for argument that nothing more happened here than a clash of the dimmed memories of busy men. Drolet having filed his charge on May 17, however, and the complaint having issued on June 29, it would seem that an attempt to keep memories sharp would have been in order. Kitchen's complete failure to recall a third stain incident, which was remembered in full detail by Powell, a much busier man, suggests to me an effort by Powell to fortify Respondent's case.

That predilection also seems apparent in Powell's testimony about the first stain incident. He said that Drolet "absolutely" moved the cloth into the box which caused the stain. Yet it is clear

from the evidence regarding the process that at the point at which Powell was informed of the stain, when it reached the dryer man, the opener man could have himself caused the stain in the interim, and Kitchen later conceded that there was a "slight chance" of that being so. Even though the incident purportedly occurred prior to the May concerted activities, the evidently anxious effort at the hearing to "absolutely" pin the blame on Drolet also bespeaks an attempt to bolster Respondent's case, and therefore makes the witness seem less reliable. 25/

There is conflict about the final error, the omission of salt on Wednesday, May 10. First of all, when Kitchen told Powell of the error early on Wednesday, Kitchen had continued to process the cloth, once the salt had been added. Powell said that he and Kitchen, at the change of shift, had discussed the potential problem, "the consequences that could cause streakiness and blotchiness and he said they looked good to him in the becks;" however, when "we got them dry to the dryer, there were streaks and blotches." But Kitchen gave a different account. He said that he could see, before he spoke to Powell, that "[t]hey

25/ I note also, as to this first error, that while Powell clearly recalled leaving Kitchen "a note" about it, Kitchen remembered with equal clarity that Powell told him about it "in the dyer's office."

were blotchy," and (as compared to "they looked good to him in the becks") he says he told Powell "they are blotchy but I don't know how bad."

Furthermore, Powell testified that Kitchen was not aware that streaks had actually resulted from the error until Powell spoke to Kitchen on the phone late Thursday night. According to Kitchen's affidavit, however, Kitchen received this information from Powell on Wednesday afternoon, when Powell called him to tell him to see Melucci on Thursday.

The foregoing contradictions, like the following few illustraions of discrepancy, do not necessarily involve items of great consequence; at the same time, certain testimonial errors seem so unlikely as to raise suspicion about the more basic reliability of the witnesses. Melucci recalled a conversation with Powell, "maybe a week or two" before the discharge, in which powell said he was having problems with Drolet's work, "that Mr. Kitchen had said something to [Powell] about the work." But accorcding to Powell, except for the salt error, he, not Kitchen, was the one who kept discovering errors in Drolet's work. Powell never mentioned having had such a conference with Melucci prior to the discharge week. But, while Powell stated that he first broached the subject of discharge on Wednesday, May 10, and was told by Melucci that he wanted to "think it over" and give him a decision the following day, at which time he "gave [Powell] permission to do so," Melucci recounted no such obviously

memorable deliberative process. He said that on May 11, Powell mentioned some damaged goods and said that "termination was in order." Upon determining that Powell was "sure," Melucci forthwith "gave him permission to termiante him."

Somewhere in this summary process, however, according to Melucci, he "may have had some discussion with Mr. Kitchen." Powell testified that he told Kitchen on Wednesday to go talk to Melucci, and Kitchen testified that he did so. Kitchen further testified that when he went to see Melucci, Powell was not present. However, he then testified, quoting from this affidavit, that "[a]t that meeting, it was agreed that Mr. Drolet would be terminated. I told them that I agreed with their decision." Plainly, the words "it was agreed," "them," and "their" indicate that Powell was present at the meeting and the decision was made at that time. Asked about this, however, Kitchen insisted that Powell was not there. And, although Kitchen said that the next time he talked to Powell was when he spoke with him on the telephone Thursday evening and was ordered to have Drolet stay at the end of the shift on Friday morning, his affidavit continues to indicate that this instruction was given at the same early Thursday meeting with Melucci. Thus, picking up at the last previously quoted sentence of the affidavit, "I told them that I agreed with their decision. Bill [Powell] then told me to notify Richard Drolet that Powell would like to see him

before he went home that Friday morning." The natural flow of these two sentences, and the word "the," again indicate that all of this happened in a single meeting. Kitchen insisted that was not so, and said he should have added to his affidavit an intervening sentence to the effect that he called Powell at his home at 11:00 that evening.

It seems grossly improbable to me that a man of Kitchen's intelligence could have read that affidavit, given only a few weeks after the events, and not notice all the asserted inaccuracies in it. Again, this does not seem a matter of great substantive moment; from Respondent's point of view, it would seem that either version of this phase of the termination would serve. It may be that here, Kitchen was attempting to bring himself into conformity with Powell's prior testimony and Powell's affidavit. It may also be that Kitchen's affidavit was out of conformity because he never was in fact consulted by Melucci, and therefore had to fabricate when giving his statement, probably something that Kitchen is not skilled at doing.

Powell testified that in his discharge interview with Drolet, "I informed him that I was letting him go and he asked why and I told him because of the mistakes that he had made since he became, since he got on the shift. And, he said that he wanted to talk it over and I said there was nothing further to talk about." Drolet gave a contrary version; he said

that when Powell discharged him and Drolet asked what complaints there were about his work, Powell said, "I have no way of knowing how your work is, I'm not your foreman. . . . Mr. Kitchen told Mr. Melucci that there was some problems with your work. . . . so Kitchen must have told Melucci to fire you and Melucci told me to let you go." The circumstances persuade me that Drolet's version is the more accurate one, for the reasons detailed below.

The attitude of Kitchen toward the discharge of Drolet is an interesting subject. Although he testified at the hearing that he "agreed" with the decision, the evidence as a whole strongly suggests that he did not. Drolet testified that 2 days before he was fired, Kitchen had asked him if he was receiving "top pay" yet, and indicated that he would ask that Drolet receive it, being pleased with his work. Kitchen was not questioned about this, but I assume he would have denied it. His failure to say anything on the subject does, however, make it difficult to evaluate his credibility on this point.

Drolet further said that when Kitchen said that Powell wanted to see him before he left on May 12, he asked Kitchen if anything was wrong. Kitchen said that nothing was wrong. When Drolet continued to express concern, Kitchen allegedly said, "Don't worry, Bill Powell is not that way, he would have told me efore he fired [you]." Employee Thomas Vining, who

was working overtime on the third shift, gave confirming evidence, saying that on that same early morning, when Vining asked Kitchen why Powell wanted to see Drolet, Kitchen said he did not know why, "because he was satisfied, he had no idea why powell wanted to see him." Kitchen admitted having said to Drolet and Vining that he did not know why Powell wanted to see Drolet, but he testified that in fact he did know; he further denied expressing satisfaction with Drolet's work.

What suggests to me that Drolet gave the accurate account of the discharge interview, in which Powell attempted to cast the entire blame on Kitchen as the initiating force is that, as Kitchen concedes, on the evening of May 12, Vining dropped by Kitchen's house to ask about Drolet's discharge. According to Vining, he told Kitchen that the employees all thought Kitchen had fired Drolet, to which Kitchen replied that he "had no complaints with his work, and it didn't come from him." Kitchen further allegedly said that he knew nothing of the discharge until it happened, and that "he didn't like to be used like that." Kitchen, on the other hand, gave the following version of the conversation:

> [H]e asked me why Richard Drolet was fired. And I says, "We felt that he was not meeting what we expected of him." And so he says, "Well, were you satisfied?" And I said, "The decision was not mine. It was agreed upon, right."

The significance of this testimony, aside from the nature of the conversation had, lies in the fact that Vining concededly visited Kitchen on the evening of May 12, When I asked Vining, at the very end of his appearnce, why he had done so, he replied, "Because, to the best of my memory, when Mr. Drolet was let go, he was told that his foreman was responsible for him being fired; which was Mr. Kitchen. And when the other people heard that, and asked, Mr. Kitchen had said the man was doing good work, that he couldn't understand it."

Thus Vining's visit to Kitchen on May 12, which is admitted, dovetails neatly with Drolet's testimony that Powell, in the termination interview, had put the blame for the discharge on Kitchen. Since I do not believe Drolet or Vining were sufficiently Machiavellian to have conjured up, by the end of the day on May 12, a false discharge interview and a method of lending it credibility, I think it likely that Powell did indeed point the finger at Kitchen as the one who had urged discharge. If that is true, then Powell's version of the interview must be considered unreliable, and so Powell's other testimony. I must say that I can see no particular reason for Powell to have shifted the onus to Kitchen, but the logic of the events suggests that he did.

It should further be noted that although Kitchen testified that he "agreed" with the termination decision, his own account of what he told Vining on

May 12 conveys a curious reluctance: when Vining asked, "Well, were you satisfied?," Kitchen answered evasively, "The decision was not mine. It was agreed upon, right."

I thought Vining was an excellent witness, although Drolet did not make as good a personal impession as Powell and Kitchen. I am not sure what to make of Drolet's testimony that Kitchen assured him early on May 12 that Powell "would have told [Kitchen] before he fired [Drolet]" and Vining's testimony as to Kitchen's having no complaints about Drolet and not liking to be "used" by Rspondent. As to the first claim, it seems probable to me that Powell would have told Kitchen of his intention to remove an employee from the very small shift overseen by Kitchen, for whatever reason he did so, and I find it hard to imagine Kitchen, with that knowledge of imminent removal, so consolingly assuring Drolet that he would not be discharged a second time.

It seems more possible, however, that Kitchen, Vining's former basketball coach, might have told Vining that he did not like being "used." That implication is echoed in a statement which Kitchen admittedly made to his shift employees on the very evening of the day Drolet was discharged. Vining testified that several days after the discharge, he had a discussion with Kitchen in which the latter said he had "taken his shift into his office and told everybody on his shift

that he had nothing to do with firing Mr. Drolet." Kitchen gave a somewhat different account, saying that he had called a meeting of the employees on May 12 to urge them to work more cooperatively with a certain employee. As the meeting ended, and the employees were leaving, Kitchen heard one say, "If we do our job, we're going to get fired anyway." Kitchen says that he replied, "If you're referring to Richard Drolet, and you want an answer, you'll have to see someone else" (or perhaps, "If you want definite answer, you speak to the higher-ups.").

Even on Kitchen's account, he sounds as if he felt he was being "used." His conceded statement to the employees denotes a lack of understanding about the Drolet discharge, contrary to his testimony at the hearing. Although he had, he says, told Vining earlier that evening why Drolet had been discharged, he was incapable of explaining at the hearing why he would not or could not do so to the other employees a few hours later.

Drolet testified that when Melucci agreed to reinstate him from his first termination, he also agreed that he would make sure that Drolet received sufficient warning of any peril in the future. Melucci virtually admitted this. When he was asked whether Drolet had received any written warnings prior to the second discharge, however, Melucci said "not to my knowledge." He further testified that he did not investigate the accuracy of Powell's claims about Drolet's

work, although he said he did make such an investigation in the case of John Moniz, see infra, to whom he had made no commitment. In view of his prior promise, one would imagine that Melucci would have looked into the question of whether Drolet had been warned and whether he had committed errors; he apparently did not do so.

Drolet's status might seem to pose a substantial obstacle to finding a violation here. He was on his second probation. He obviously had made a bad impression on his shift foreman the first time around ,being allowed to serve out only 31 days of the 60-day probationary period. Although Respondent affords substantial leeway to regular employees, 26/and the record further shows that such cloth damage occurs throughout the year as a result of employee error, it is not reasonable to apply those standards to Drolet's case. The purpose of a probationary period is to free an employer to exercise discretion in judging a new employee's ability. Drolet, in his second probation, was unquestionably riding on the razor's edge.

On the other hand, Drolet came pretty close the second time. he had completed 53 days of the period before he was

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26/ Melucci testified that it is not until the third written warning that a permanent employee receives the first real discipline -- a 3-day suspension.

discharged. In a case which seemed susceptible to corroboration of Drolet's alleged errors, Respondent produced none. Powell was the only witness to directly testify to having viewed the first three stain errors, although he named employees who also saw them. In the case of Moniz, as discussed below, Melucci testified that he may have called one of the several foremen in the finishing department "to be sure that there was damage," but he did not do so with Drolet, despite his acknowledgement that Drolet had believed "that he wasn't given a fair shake by his previous foreman." Not only was it inconsistent to give Moniz more favored treatment, but this also indicates the possiblity of corroboration, a critically useful technique in a case like this one.

The fact, indeed, that Powell sought permission for the discharge is itself strange; Drolet had been discharged by his shift supervisor the first time. If it be argued that Powell took this extraordinary measure to assure that Drolet received the due process he had complained of not getting to his first discharge, that solicitude is oddly inconsistent with Melucci's failure to look more thoroughly into Drolet's discharge than Moniz. 27/

27/ Drolet gave some testimony that can be read as an admission that Kitchen had, on one occasion, cautioned him to improve his work (Tr. 544-545). In view of the context of having just denied receipt of any "oral or written warnings," a position he later reasserted, I believe that this response to General Counsel's question was artlessly phrased, and was really intended, as a part of the Government's case, to indicate that other employees routinely committed errors.

It seems to me that there is an arguable problem here of attempting to use Kitchen for different, and facially conflicting, purposes. The most likely source of Respondent's knowledge of Drolet's efforts to stir up employees in reaction to Pacheco's discharge would be his conversations with other employees on the third shift, which, the argument goes, would be picked up and transmitted by Kitchen to Powell. On the other hand, the proponents of Drolet attempted to establish that Kitchen was pleased with Drolet's work, and truly shocked and amazed when Drolet was discharged. On reflection, these two possibilities do not seem irreconcilable. Kitchen may well have felt it his supervisorial obligation to convey the news of such activity to Powell, so tha Powell might know the general situation, and at the same time not have expected any discipline to result from these reports.

The discharge of John Moniz, another probationary employee, 5 days after the termination of Drolet, which I hereafter find to have violated the Act, lends some weight to my conclusion here. The pattern of the Moniz discharge and the inconsistencies between Respondent's witnesses on that subject were similar to the Drolet case. While the prior discharge of Drolet necessarily detracts from the following observation, it was highly unusual for Respondent to fire aprobationary employee; to discharge two of them in a 5-day period

was undoubtedly unprecedented. 28/

In my judgment, therefore, it is proper to resolve this close question in General Counsel's favor. There is no direct evidence of unlawful motive in this case; there seldom is. I cannot say that Drolet did not commit a stain error, and it is conceded that he failed to add the salt on May 10. 29/ Nonetheless, in view of the highly suspicious discrepancy, contrivance, blithely vouched-for inaccuracy, partial admissions, and earnest efforts to bolster Respondent's defense, a great deal of smoke billows up; I am will to infer fire from that smoke, for all the reasons given above.

Accordingly, I conclude that the discharge of Drolet on May 12, 1978, violated Section 8(a)(1) of the Act.

III. The Discharge of John Moniz

John Moniz was hired as a jig operator on March 28, and fired on May 17. I think that the evidence in his case supports a conclusion of unlawful discharge.

It appears from Moniz' involvement in

28/ As counsel point out on brief, firing probationers may be thought of as one way to avoid questions, while achieving the desired effect.

29/ On the testimony of Kitchen and Drolet as a whole, it appears to me more likely that Drolet forgot to ask Kitchen whether to add the salt rather than simply forgot to do it.

in the controversy surrounding the health and safety committee and the discharge of Pacheco and Drolet was more visible and persistent that was Drolet's concerted activity. Moniz testified that beginning on May 5, as he waited at the timeclock with fellow third shift employees ready to punch out and first shift workers preparing to clock in, he had held repeated discussions with these grouped empoyees some 15 feet away from the dyer's desk, where his immediate shift supervisor, Robert Bousquet, would stand discussing business with Michael McCArthy, superintendent of the jig dyehouse. 30/

Moniz had been a union shop chairman with another employer, and the employees evidently thought of him as something of an expert in labor relations. During their conversations at the clock, the employees would ask about action to be taken to obtain Pacheco's reinstatement, and Moniz would make recommendations, including attendance at the May 7 meeting. These conversations continued every morning until his discharge, expanding after May 12 to include the subject of the discharge of Drolet. Moniz also spoke out at the May 7 meeting, saying that Pacheco should be supported "right or wrong," and that Steward Cummings had better not be harassed because of the incident. While testimony given by Moniz in another context, as Respondent argues, might be read to indicate that it would be

30/ Bousquet supervised about 9 men; McCarthy, a total of about 31 on the three shifts, as well as 3 foremen.

difficult, while the machines were running, to understand a conversation from even 6 feet away in the dyer's light area, it seems probable that over the period of time described by Moniz, at the changing of the shifts, the machines would probably be quiet enough for a sufficient time to allow convesations to be heard. 31/

Respondent's testimony was that probationary employee Moniz was fired for inferior performance. As in Drolet's case, the stories of the two supervisors involved, McCarthy and Bousequet, do not hang together, and there were discrepancies too substantial to be disregarded.

Moniz was a jig operator of some 12 years experience, although that experience had been obtained perhaps a decade prior to the instant employment. There is no question raised by Respondent about Moniz' ability to operate the machine, and certain undenied testimony by Moniz about special assignments given him indicates that his expertise was generally recognized. Respondent's argument is basically that he simply became careless after being on the job a while.

Because of internal and external conflict in the tesimony of McCarthy and Bousquet, it is no easy task to determine

31/ It does seem likely that such conversations would be conducted sotto voce; however, group talk of this kind can get out of hand.

what errors Moniz allegedly committed, when he allegedly committed them, and how the two men allegedly reacted. McCarthy testified that the first error of which he became aware occurred, he "would estimate," about "two weeks before" the discharge. He said that the first shift operator, Chester Kasowitz, brought to his attention color spots on some rolls dyed on the third shift by Moniz, a defect which McCarthy concluded was caused by Moniz' failure to wash out the jigs before running the rolls. His pretrial affidavit, however, puts this occurrence not around May 3, but rather about the first week in April. McCarthy testified that he told foreman Bousequet to warn Moniz about this error, and the next morning verified that Bousquet had done so. It took 4-5 hours to repair the error, but no goods were lost.

The "first" error from Bousquet's point of view was a "minor" one, involving placing the wrong rolls on the wrong machine. Bousquet did not mention this to McCarthy. Bousquet openly testified that he had not been aware of what McCarthy called the "first" error, set out above, speculating at the hearing that the note purportedly left for him by McCarhty concerning this matter must have been lost. Bousquet said that he did not become aware of this incident until he read McCarthy's affidavit just before the hearing. 32/ Of course, the fact that

32/ McCarthy had told him to read the affidavit to "make sure our stories coincided."

Bousquet says he received no contemporaneous information about his "first" incident means that McCarthy could not, as McCarthy testified, have been assured by Bousquet that Moniz had been talked to.

Because of the uncertainty in the testimony of the two, however, it may e that McCarthy's "first" or "second" incident was Bousquet's "third," about which Bousquet says McCarthy talkedt o him and then he to Moniz. McCarthy testified that therewas a second damage incident which may have been similar in nature to the first, but he remembered virtually nothing about it, including whether he spoke to Bousquet. It is apparent that the incident, if it occurred, made almost no impression on McCarthy.

Bousquet's evident correlative of the foregoing incident--the first alleged Moniz error involving stains which Bousquet recalled--was an occasion when McCarthy told him that the first shift operator had again spotted stains (and at this time McCarthy "mentioned again, to me, that he had stains before, but I was unaware of it at the time"). Bousquet said that he warned Moniz that he "wasn't cleaning his machines out properly." This, Bousquet testified, occurred about 6 working days before the termination. He said it took 4-6 hours to rehandle the goods.

Before discussing Moniz' final alleged error, it is appropriate to turn

to Moniz' testimony on the subject of his work performance. Moniz said that the only "mistake" he made was putting the wrong roll on the wrong jig about 3 weeks before he was terminated, the incident characterized as "minor" by Bousquet. He also testified, however, to two incidents occuring about 3 weeks prior to his discharge, within a few days of each other, in which Chester Kasowitz had left notes "saying that I had created dye stains on the rolls." Moniz attributed the first alleged error to bad supervision by Bousquet, and further stated that Bousquet had exonerated Moniz on both occasions.

Bousquet did not rebut Moniz' very detailed account of these incidents. While I felt that Moniz exaggerted his tesimony at times, I am inclined to accept it here. The fact is, however, that some cloud of suspicion may arguably have been raised about Moniz' performance by the very fact that, as Moniz admitted, Kasowitz did leave these accusatory notes.

The final, and critical, "error" is attended by sharp conflict on Respondent's side. McCarthy testified that, "a day or two" before the dismissal, the first shift operator brought to his attention the presence of "color spots" on three rolls. He and Bousquet went over to the machines and "we clearly saw color spots." These spots were caused by "undissolved color."

Although McCarthy did not expand on

the cause of this damage at the hearing, his pretrial affidavit is in the exhibits file, marked as General Counsel Exh. 9. It goes into detail concerning the nature of Moniz' final mistake: "The color spots were on the cloth because the color was not mixed in properly. The jigger is responsible for mixing in the color. The spots were on this cloth because Moniz did not mix the color properly in the jig." I note that although the exhibit was identified by McCarthy, and offered by counsel for General Counsel, without objection, for a certain purpose, I stated that it seemed unnecessary to receive the document into evidence for that limited purpose. In the absence of objection, and becuase it so clearly documents and describes the final error claimed by McCarthy, I now receive General Counsel Exh. 9.

Bousquet, however, testifying about this last error, said that he and McCarthy inspected the goods, and the damage was "fixed stains," caused by "not washing the machines out properly . . . [a] scum [forms] around the sides of the machines and that has to be taken off between each set of rolls and he didn't do it because it came out on the next set of rolls. . ." Bousquet further specified that he himself saw no error by Moniz caused by "unsettled dye."

This disparity seems to me to be an important one. Here are two experienced supervisors, purportedly having viewed the same damaged rolls of cloth, the final

straw which directly led to the dismissal of an employee, and one reports "spots" caused by improperly mixed color, while the other sees "stains" resulting from a failure to wash the machine. I infer that Bousquet felt that he could not change his account after McCarthy testified because his pretrial affidavit plainly spelled out "stains," not "spots." But that forced discrepancy between both the affidavits 33/ and the testimony of the two witnesses raises a serious question about whether any damage occurred inthe first place.

The circumstances surrounding the execution of the discharge compound the suspicion. McCarthy testified that he "discussed with Mr. Bousquet the discharge or reasons for the discharge," although he could not recall when; McCarthy said, however, that Bousquet did not actually "know" what Moniz was to be discharged until after it happened. This distinction is not an implausible one. But Bousquet at first indicated that he had absolutely no idea that the discharge of Moniz was under active consideration until it happened; 34/ thereafter, however, he

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33/ The affidavits were taken on June 8, only 3 weeks after the discharge.

34/ "Q. No supervisor expressed to you an intent to terminate Mr. Moniz?
A. No.
Q. Or that he was thinking about it?
A. No.

. . . .

Q. And you had no idea that no [sic] supervisor was thinking of discharging him?
A. That's right."

testified that, after the final error, he an McCarthy "discussed the problems of the stains. How many times it has happened and he asked [me] my opinion of John Moniz, whether he should let him go or not, and I told him yes." Plainly, in the face of such a conversation, Bousquet could not sensibly testify that he had "no idea that [a] a supervisor was thinking of discharging" Moniz.

The effort made by McCarthy and, as we shall see, Melucci to convey the idea that Bousquet was ignorant of the decisional process relating to the termination fo Moniz seems to relate to the fact that just after McCarthy told Moniz of the discharge on the morning of May 17, Bousquet, who had been standing nearby, approached Moniz and asked if he wanted to work overtime, a question which understandably astounded the just-discharged Moniz. Melucci's descrption of his own role in the discharge, which also attempts to isolate Bousquet, is most peculiar. He said that McCarthy came to him and stated that Moniz was doing defective work, mentioning "two or three errors, " and that "he wanted to let him go." Melucci further testified that he "may have called another foreman in the finishing department to be sure that there was damage and they assured me of that . . . It could have been either of two or three other foremen. . . It could have been Mr. Carlson, it could have been Mr. Ryan, it could have been a Mr. Simbro." Melucci was sure, however, that it was not Bousquet that he called.

There are three odd aspects of this testimony. One arises from Melucci's testimony that "[g]enerally, probationary employees have been fired in the past without consulting with me because the superintendent is usually the one who passes judgment on whether he wants to try [sic] the man or not." Melucci testified that it just happened that McCarthy brought the subject up in one of their frequent meetings. But his testimony -- that McCarthy said he "wanted to let him go" -- indicates that a request, not a simple announcement, was being made. Against the "general" practice declared by Melucci, no reason suggests itself for McCarthy singling out Moniz for special treatment other than his participation in the protests against the two prior discharges.

In like vein, since "the superintendent is usually the one who passes judgment" on probationary employees, it is hard to imagine why Melucci "may have called another foreman in the finishing department to be sure that there was damage" -- why would he not have trusted McCarthy, a superintendent for 7 years? And the next question, of course, is, having decided on an independent check, why he would <u>not</u> have called Bousquet, Moniz' own foreman, who was allegedly conversant with the damage, who had purportedly warned Moniz, and who is supposed to have personally and jointly viewed the final damage along with McCarthy?

A further question arises from the timing of the supposed final straw. Although Bousquet testified that he and McCarthy discussed the question of whether McCarthy "should let him go or not" immediately after viewing the results of the last error, Bousquet's affidavit states, "About three days after Moniz' third mistake, Mike McCarthy approached me by the dyer lights and asked me if John Moniz was worth keeping." Since the affidavit was given only 3 weeks after the discharge, its accuracy would seem more certain. This would indicate that, if there had been a final error, it was not considered very significant at the time. That being the case, the timing of the decision to suddenly discharge Moniz on May 17 -- aWednesday -- suggests that some other intervening event gave the error retroactive importance.

McCarthy testified that in firing Moniz, he told him that his work was "not satisfactory." Moniz said that McCarthy told him, "I'm not satisfied with your work, and you're creating problems with the older workers." 34/ Moniz also testified that at a subsequent grievance meeting between himself, Melucci, and Joseph Alfonso, a Union business agent, Melucci said that "they wasn't satisfied with my performance, and I was creating problems." The nature of the "problems"

34/ The uncontradicted, and likely, testimony is that most of the senior employees are on the first shift.

was not, however, delineated at this meeting, according to Moniz; but Alfonso testified that at the meeting, Melucci specified that Moniz was "creating trouble with the older workers on the first shift." Melucci generally denied any such reason for discharge.

Although Melucci was a reasonable impressive witness, he was not, as indicated above, overwhelming; however, that Alfonso should hear something about "older workers" during the grievance meeting which Moniz' obviously more interested ears did not detect creates a suspicion about the claim that reference was made to problems with the older workers. McCarthy seemed too intelligent to make such a damning statement, and so did Melucci. 36/ While I do not necessarily rule out the possibility that these statements were made, I do not rely on them here.

Nor do I give much weight to testimony by various employees attributing to supervisors complimentary remarks about Moniz' superlative performance. Some of this testimony related to supervisors who would not know much about Moniz' work, some related to Moniz' familiarity with the work rather than his punctiliousness, and some did not seem particularly reliable. While Bousquet conceded having said tha Moniz "could run machines as well as anyone," that does not seem very

36/ Although not expressly asked to deny these references, their general testimony clearly comprehends a denial.

meaningful with regard to a machine which takes 2-4 weeks to master.

The evidence recited above nonetheless presents, in my opinion, a solid basis for concluding that Moniz was not discharged for work deficiencies. Although I am reluctant to discredit Bousquet and McCarthy, whose demeanor made a favorable impression, the real and inexplicable conflict in their testimony about the allegedly final and fatal error leads me to believe that no such error occurred. The other testimonial discrepancies, and the extraordinary participation, and its peculiar nature, by Melucci in the discharge constitute unusual circumstances which are not easily rationalized. The role played by Moniz in frequently discussing the two prior discharges, perhaps appearing to emerge as an incipient leader to replace the departed Pacheco, occurred within earshot of McCarthy. In this setting, and on these findings, "proof . . that the reason given was false warrants the inference that some other reason was being concealed," N.L.R.B. v. Joseph Antell, Inc., 358 F.2d 880, 883 (C.A. 1); Shattuck Denn Mining Corp. v.N.L.R.B., 362 F.2d 466, 470 (C.A. 9).

For the foregoing reasons, I conclude that the discharge of Moniz on May 17, 1978, violated Section 8(a)(1) of the Act.

36/ Although not expressly asked to deny these references, their general testimony clearly comprehends a denial.

Conclusions of Law

1. Respondent, Pioneer Finishing Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Local 1057, Textile Workers Union of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act. 37/

3. By suspending Kenneth Pacheco, and then discharging him, on or about, respectively, May 5 and 11, 1978, Respondent violated Section 8(a)(1) and (3) of the Act, and by discharging Richard Drolet and John Moniz on May 12 and 17, 1978, respectively, Respondent violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Other than as set out above, Respondent has not violated the Act in any manner alleged in the complaint.

37/ The labor organization popularly known as "Textile Workers Union of America" was, in June 1976, merged into an entity known as "Amalgamated Clothing & Textile Workers Union, AFL-CIO-CLC." Since the complaint uses the nomenclature set out in the body, and was never amended, I shall accept the pleading verbatim, as does the answer conceding the allegation.

The Remedy

Having found that Respondent has violated the Act by committing certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the polices of the Act.

I shall recommend that Respondent be required to offer reinstatement to Kenneth Pacheco, Richard Drolet, and John Moniz, and to make them whole for any loss of earnings they may have suffered by reason of their unlawful discharge, by payment to them of a sum of money equal to that which they normally would have earned from May 5, May 12, and May 17, 1978, respectively, to the date of a valid offer of reinstatement, less net earnings during those periods, to be computed in the manner described in F. W. Woolworth Company, 90 NLRB 289, and Florida Steel Corporation, 231 NLRB 651. I shall also recommend that Respondent be required to post an appropriate notice. I defer to the Board the request made by General Counsel for adoption of a new interest rate of 9 percent per annum.

Upon the foregoing findings of fact and conclusions of law, the entire record, and pursuant to Section 10(c) of the Act,

I hereby issue the following recommended: 38/

ORDER

Pioneer Finishing Corporation, Fall River, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or taking other adverse action against any employee in circumstances constituting interference with, restraint of, or coercion of employees in the exercise of their rights under Section 7 of the Act, or constituting discrimination to discourage union membership.

(b) In any other manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is designed to effectuate the policies of the Act:

38/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Offer to Kenneth Pacheco, Richard Drolet, and John Moniz immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make them whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, all payroll records, social securty payment records, timecards, personnel records and receipts, and all other records necessary to analyze the backpay due under the terms of this Order.

(c) Post at its place of business in Fall River, Massachusetts, copies of the attached notice marked "Appendix B." 39/ Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by its representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the

39/ In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. June 6, 1979.

/s/ Bernard Ries
Bernard Ries
Administrative
Law Judge

APPENDIX A

FIGHT FOR SAFETY NOW . . BEFORE ITS TOO LATE

Pioneer Finishing is a dangerous place to work. None knows this better than we Pioneer workers who face these dangers day in and day out.

In 1977 alone, there were 28 serious accidents resulting in 2,248 hours of lost timeand wages! Which of us will be victims of these crippling accidents in 1978? How many of us risk accidents daily because of holes in the floor, falling lights, defective trucks, machinery, etc.? Only an effective Health & Safety Committee can ensure a safer future for us all.

BUT DON'T WE HAVE A HEALTH & SAFETY COMMITTEE?

By a slim margin last November, we decided not to strike. . .partially because we had won a union Health & Safety Committee.

First the company wants the Health & Safety clause stricken from the contract, opening the door to its cancellation after a short trial period. The reason the company wants this is clear. After all, an effective Health & Safety Committee forcing the company to fix the hazards affecting you and I is bound to cost them money. The company is especially afraid of having to interrupt production in order

to make these necessary repairs.

Since management isn't sure they'll be able to keep the Health & Safety language out of the contract, they're also trying to make certain they have a Health & Safety Committee they can control. To do this, they want to pick the workers who'll be on the committee, rather than allow the workers to decide.

WHAT MUST WE DO TO FORCE THE COMPANY TO BACK DOWN?

We must show our General Manager, Kenneth Dufault, that his is too important for us to give up. To do this, we must:

*** Attend the meeting this Sunday, May 7th, at 1:30 p.m. in the Union Hall at 1039 South Main St. to reject this proposal;

*** Raise the issue with fellow workers and encourage them to attend the meeting;

*** Let your shop committeemen and stewards know you're upset with the unsafe working conditions and you want the Company proposal rejected;

*** Take note of Health & Safety problems that affect you and others in your department -- let me know about them.

Kenneth Pacheco
Shop Chairman

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial in which all parties had the opportunity to present evidence, it has been decided that we violated the law. We have been ordered to post this notice. We intend to carry out the Order of the Board and abide by the following:

WE WILL NOT fire or otherwise discipline any employee for engaging in concerted activities protected by Section 7 of the Act, and WE WILL NOT fire or otherwise discipline employees to discourage union activity.

WE WILL offer to take KENNETH PACHECO, RICHARD DROLET, and JOHN MONIZ back at tehir old jobs, or if necessary, substantially similar jobs, and WE WILL pay them for any wages lost, with interest, during the period of their discharges.

The act gives to all employees these rights:

To engage in self-organization
To form, join or help unions
To bargain collectively through a representative of their choosing
To act together for collective bargaining or other mutual aid or protection; and to refrain from

any and all these things.

WE WILL NOT do anything that interferes with these rights.

PIONEER FINISHING CORPORATION
- - - - - - - - - - - - -
(Employer)

Dated ----- by ---------- -----
Representative Title

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 12th Floor, 99 High Street, Boston, Massachusetts 02110, Telephone 617-223-3313.

APPENDIX C

Amalgamated Clothing & Textile Workers Union Fall River

-vs-

Pioneer Finishing Company, Fall River

ARBITRATION: On May 25, 1978, the above named parties, and the grievant, agreed to submit the following issue to arbitration before Robert A. Browning, for a final and binding decision:

Was the Company Justified in discharging Kenneth Pacheco?

The parties mutually agreed to waive any time limits on the submission of the Arbitrator's Report.

The parties mutually agreed to permit Thomas Vining, Richard Drolet, George Cummings, Timothy Reid and Jessie Ferreira to submit a written depostion to the arbitrator subsequent to the Hearing.

* * * * * * * * *

* * * * * * * * *

FOR THE COMPANY	FOR THE UNION
Henry Marzilli, Esq.	Ken Dufault, Gen. Mgr.
Louis D'Amico, Pers.	Jos. Alfonso, B.A.
Thomas Melucci, Pres.	Kenneth Pacheco, Grievant
Wm. Querim, Foreman	Brian Cunha, Grievant's atty.
Wm. Powell, Supr.	Thom. Vining
Mike McCarthy, Supr.	Richard Drolet
	Geo. Cummings, S.S.
	Tim Reid
	Jesse Ferreira

* * * * * * * * *

BACKGROUND OF THE CASE

On May 2nd, 1978, Kenneth Pacheco, a 1st shift worker and Shop Chairman, was observed by William Querim, Foreman...(and by other supervisory personnel)...to be distributing pamphlets to the workers on the 2nd shift. Each supervisor who witnessed the distribution assumed that some other Company official had given Pacheco permission. The grievant testified that Foreman Dave Querim gave him permission; however Querim testified that while he had glanced at the pamphlet, the had not given permission to Pacheco.

The pamphlet which Pacheco was handing out

was titled "... Fight for Safety Now...Before It's Too Late." and was signed, Kenneth Pacheco, Shop Chairman. In the interest of brevity, I shall quote here only those phrases from the pamphlet which were claimed by the Company to be exaggerated or inflammatory.

- "Pioneer Finishing is a dangerous place to work. No one knowns this better than we Pioneer workers who face these dangers day in and day out."

- "In 1977 alone, there were 28 serious accidents resulting in 2,248 hours of lost time and wages! Which of us will be victims of these crippling accidents in 1978?"

- "First, the company wants the Health & Safety clause striken from the contract, opening the door to its cancellation after a short trial period. The reason the company wants this is clear. After all, an effective Health & Safety Committee forcing the Company to fix the hazards affecting you and I is bound to cost them money. The company is especially afraid of having to interrupt production in roder to made these necessary repairs."

"...(The Company)...is also trying to make certain they have a Health & Safety Committee they can control."

The Company's rebuttal to the accusations above came from oral trestimony by President Thomas Melucci and Comptroller Louis D'Amico, as well as from a letter to Union Business Manager Kenneth Dufault from President Melucci, dated May 5th, 1978. (Company Exhibit C)

They denied that Pioneer Finishing Company was "a dangerous place to work."

They testified that of the 28 accidents occuring in 1977;

- 19 accidents involved no lost time,
- 5 accidents involved lost time of 1 to 6 days.
- 4 accidents involved time lost of over 7 days.

Regarding the four accidents involving lost time of over 7 days:

- One, was a 'hurt' back, lifting a roll of cloth.
- One, contracted dermatitis.
- One, pulled a muscle in elg.
- One, from chemical splash. (Employee not wearing protective eye goggles)

There was no denial from the Union or grievant Pacheco that the above was not the facts regarding the accidents in 1977.

The Company claimed that Pacheco's statement of "crippling accidents" is untrue and misleading in the face of the evidence.

The Company brands Pacheco's statement...that.."to fix the hazards...is bound to cost them money."....as libelous.

The Company stated: "The circular strongly implies that we do not intend to live up to commitments made during contract negotiations. This is a false assertion."

* * * * * *

On May 4th, 1978, Pres. Melucci was shown the circular distributed by Pacheco, and was given an account by various supervisors of the actions of Pacheco on May 2nd. On May 5th, Melucci sent a letter to Union General Manager Kenneth Dufault in which he suspended Pacheco pending further review of the situation. (Company Exhibit C) In addition to the statements made on the top half of this page, Pres. Melucci further stated that Pacheco had violated Article 1, of the Contract, which provides: "The purpose of this Agreement is to provide orderly collective bargaining relations, to secure prompt and equitable disposition of grievances, to establish fair wages, hours and other working conditions, <u>to maintain a harmonious relationship between the Union and Company</u>, to prevent strikes and lockouts...."

It was Melucci's contention that ... such a.. "circular distributed does not contribute to this harmonious relationship and contains libelous, misleading, false and inflammatory statement."

He also stated. . . "our contract states (Article 2, D) that we will provide bulletin boards for posting of official notices only. Distribution of the circular on company premises is (a) violation of our contract."

* * * * * *

On May 11th, a grievance meeting was held involving Dufault, Pacheco for the Union, and Melucci and Marzilli for the Company. (Other unidentified persons were present.) Melucci testified that the tenor of Pacheco's remarks at this time was that he felt completely justified in what he had done, and that he would do it again. It was this latter statement..."that he would do it again"... that finally caused Melucci to determine that Pacheco should be discharged.

* * * * * *

On May 8th, Kenneth Pacheco wrote the following letter to Thomas Melucci, President of Pioneer:

Dear Mr. Melucci:

This is to inform you of my position on the circular or leaflet that was passed

out with my name on it. As Shop Chairman or Pioneer Finishing, it is my responsibility to inform the workers of situations that affect them in Pioneer Finishing. Health and Safety of the workers, clearly a responsibility of the Union to enforce, the Company to abide by and secure, is important to all my members. The purpose of my circular was to inform the workers of the present status of the Health and Safety Committee and to urge the members to attend the meeting Sunday, May 7th, on this matter.

The intent of the leaflet was not to incite the workers to possible illegal acts. Nowhere in the circular is this implied. As Shop Chairman I could not and would not encourage any such thing. Furthermore, as Shop Chairman, my job is to enforce the contract and not to violate it. I have not violated the contract, not, would I encourage anyone else to violate the contract.

I firmly believe I did the right thing by writing up this leaflet. However, I regret any misinterpretation of the circular by the company and hope that this letter clarifies my position.

Signed Kenneth Pacheco

ARBITRATOR'S OPINION AND DECISION

Each case in arbitration is heard and judged on its own merits. This case will be judged in this manner.

However, any insight which will bring the subject matter into perspective may be of help to both the arbitrator and to the Parties. One type of insight commonly provided to arbitrators is what prior arbitrators have had to say about cases of a similar nature. In this instance, similar cases would involve a lower level union official such as a shop steward or chairman; taking an action against his company which he described as "union" business; and the penalty imposed (and upheld or denied by the arbitrator).

Excerpts from three cases will follow:

44 LA 1022

QUINN WIRE & IRON WORKS, INC.

It is contended by the Union that (1) Grievant's position as chairman of the shop committee made it necessary for him at times not to be completely in agreement with the management; (2) The Company had condoned his conduct; and (3) That there had been insufficient notice to

grievant prior to discharge. Each of these will be considered.

Every working Union official occupies a dual role. One as a representative of the union members and one as an employee himself. As an official of the Union it is his duty to safeguard and protect the rights and privileges of union members under the agreement as a person of superior experiencea nd knowledge, it is his duty to do it in the manner provided in the contract. In his role as employee, he is subject to the same requirements and obligations as the other employees of the working force.

Both as a Union representative and an employee, self-help can lead only to difficulty.

This subject was examined in the case of Mansfield Tire & Rubber Co., 32 LA 803, by Mr. Dworkin in which he made the following comments:

"Arbitrators have consistently expressed disapproval of any form of "self help" in order to achieve rights and benefit guaranteed by the contract. The chairman has previously had under consideration a case in which the following opinion was expressed which is applicable to the instant case:
Babcox & Wilcox Co., 29 LA 681 (1957):
"The writer of this opinion takes the firm view that neither an employee nor his collective bargaining agent may employ self-help or force in securing compliance with the terms of an existing contract.

The above was arbitrator's opinion.

Grievant lost the case.

Having regard to the form of the notice which was posted and the intent which it portrayed, i.e., to refrain from purchasing products which were manufactured at this plant of the company which, if successful would affect the jobs of the employees in the bargaining unit as well as the company operations, there can be no doubt that this type of notice is not within a reasonable interpretation of 'normal business notices' set out in Article 6 of the collective agreement. The grievor admitted at the hearing that he would now expect to obtain permission to post such a notice and that conclusion should have been obvious to him on November 3rd. While other boycott notices may have been posted on this board. These notices dealt wtih other companies and their products and while the company might have objected to such notices on the matter of principle, if they had been observed, such notices would not be as serious a matter to the company as the notice in this case which directly affected its business and its employees. An employee, whether a union officer as well, owes to his employer a duty to act responsibly and reasonably in the performance of his duties for the employer. It is one thing to disseminate information to union members at a membership meeting or even by mail to them, but quite another and more serious matter when such information directly

affects the company and is posted on a bulletin board reserved for union notices in the plant. Without any other qualification it is a reasonable inference from that action alone that the union supports the action. The grievor in this case did not discuss the posting with his executive but made a special trip to the plant on a day in which he was not scheduled to work in order to bring this resolution immediately to the attention of the employees. It is quite understandable in these circumstances that the company would view this action and the notice itself as a serious matter.

The above was arbitrator's Opinion.

* * * * *

INT'L TELEPHONE & TELEGRAPH CORP.

Decision of Arbitrator

In re INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION, ELECTRON TUBE DIVISION (Roanoke, Va.) and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 162, Grievance no. 177, FMCS Case No. 70A/3794, may 27, 197_/

Arbitrator: George Savage King, selected through processes of Federal Mediation & Conciliation Service.

DISCHARGE

- Insubordination - making speech in company cafeteria during lunch time - union Steward - 118.6527 118.864

Discharge for insubordination was justified in case of shop steward who delivered speech relating to working conditions in company cafeteria during lunch time despite order of his supervisor that he refrain from making further speeches because they disturbed other employees who had complained that speeches subjected them to choice of leaving room, which was only suitable place for lunch, or becoming part of captive audience. Employer had obligation to protect employees who did not wish to be disturbed. Although speech of steward is afforded some protection by National Labor Relations Act, it appearing that the talk was made by union official discussing working conditions among group of fellow employees on non-working time in non-working area, employer did not undertake to prohibit grievant from talking about such matters and even specifically suggested to grievant that he could discuss whatever he wished at table with other employees; only limitation was that grievant should not impose his speeches on all others in lunchroom. Fact that speech was brief is irrelevant.

Above - Synposis of Case

Below - Arbitrator's assessement of Steward

He simply contended he had a right to continue to make the speeches. Apparently because he believed that his position as a Job Steward gave him not only a duty to speak in the interest of employees but a right beyond the Company's power to stop so long as the speeches were confined to subjects involving the Union and Company.

All of the facts in the Pacheco case, with one exception, are incontrovertible. The only one exception is that Pacheco claimed that Foreman Dave Querim gave him permisssion to pass out the circulars. Querim denies this, and I find Querim more ceditable.

I find further that Pacheco (1) did enter the plant on the 2nd shift (not his own) without permission; that (2) he did pass out the circulars to workers on that shift without permission; that (3) the circular was signed and composed by him; that (4) all of the above was done on his own authority and responsibility and that neither the Union General Manager nor the assembled Union membership gave him any such authority and responsibility and that neither the Union General Manager nor the assembled Union membership gave him any such authority to so act; and (5) that he did state to the Company during the grievance meeting of May 11th that he would take the same action again.

Comparing the contents of the circular

with the facts elicited from testimony at the Arbitration Hearing, it is my belief that Pacheco grossly exaggerated, with the intent to deliberately mislead, the safety record of the plant in 1977. The facts, not rebutted by the grievant, indicate that there were only four accidents having lost time of more than 7 days. This does not support the contention that Pioneer was an unsafe plant.

Pacheco, in his circular, made two other attacks upon the Company...both upon the integrity and motivation of its top officials, when he stated in the circular; (1) "The reason the company wants this is clear. After all, an effective Health & Safety Committee forcing the Company to fix the hazards affecting you and i is bound to cost them money." (2)..(The company)..'is trying to make certain they have a Health & Safety Committee they can control." At the Hearing, Pacheco gave no evidence which would tend to prove these charges against the Company.

Two further paragraphs in Pacheco's

circular seem to indicate that he was using the company's premises and his captive audience on the 2nd shift to change the course of collecting bargaining when he wrote: "Attend the meeting this Sunday, May 7th at 1:30 p.m. in the Union Hall...to reject this proposal." ...and..."Let your shop committee men and stewards know you're upset with the unsafe working conditions and you want the company's proposal rejected."

Obviously, the question to be decided in this case is whether Pacheco was engaged in "protected activity" in writing and circulating his leaflet in the manner in which he did. A Shop Steward or Chairman's primary responsibility is in the investigation and handling of grievances in accordance with the Contract. His activity in this area of labor-management relations is "protected". On occasion, the Shop Chairman may be delegated by the Union General manager or Business Agent to perform some task relative to the men in the plant. So

long as he does not contravene the Contract in effectuating this task, he may be said to be engaged in "protected activity".

However, the wide extent of Pacheco's voluntary assumption of labor-management duties without express direction of his union superiors leave him clearly outside the pale of protection. His illegal entry into the plant and the circularizing of the captive workers on the 2nd shift were contrary to Article 1 and Article 11, Sections (D) and (E).

The contents of the circular relative to the "dangers' of the plant and the "serious" 28 accidents were foundto be untrue during the hearing. Taken as a whole, the contents of the circular damned the management of the plant, impugned their integrity and attempted in a very serious way to destroy any "harmonious relationship..."

Mr. Pacheco's adventure as an unelected

Union Business Agent was enough to bring down the most serious penalty upon his head. Even this may have been avoided if during the meeting of May 11th, Pacheco would have conceded that he had indeed gone too far. Mr. Melucci testified that Pacheco said during that meeting that he would do it again. This was clearly too much.

If Pacheco sincerely believed that the plant contained serious potential for accidents, he should have had the union General Manager appeal to OSHA or to the company's Workmen's Compensation Insurance Company. (The Company testified that the Insurance Company checks the plant once each month.)

I have read and noted the written depositions (briefs) sent by five employees of the company. I recommend them to the above paragraph. The issue before me was <u>not</u> whether certain employees thought unsafe conditions existed, but whether Pacheco exceeded the Contract in doing what he did.

DECISION

Kenneth Pacheco was justifiably disbarred.

June 21, 1978.

/s/ Robert A. Browning

June 21, 1978.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1038

PIONEER FINISHING CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

KENNETH PACHECO, RICHARD M. DROLET
and JOHN MONIZ,
Intervenors.

Before COFFIN, Chief Judge,
ALDRICH and BREYER, Circuit Judges.

ORDER OF COURT

Entered: December 23, 1981

It is ordered that the petition for rehearing herein filed on December 14, 1981, be, and the same hereby is, denied.

By the Court:

/s/ Dana H. Gallup,
Clerk.

[cc: Mr. Mack & Mss. Morgan and Novick.]

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-807

PIONEER FINISHING CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 22, 1982.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 19th day of March, 1982

Office - Supreme Court, U.S.
FILED
JUL 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2162

In the Supreme Court of the United States

OCTOBER TERM, 1981

PIONEER FINISHING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
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Washington, D.C. 20530
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Assistant General Counsel

National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the Board abused its discretion in refusing to defer to an arbitration decision that did not resolve the unfair labor practice issue presented to the Board.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2162

PIONEER FINISHING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

Portions of the opinion of the court of appeals (Pet. App. A-1 to A-10) are reported at 667 F. 2d 199.[1] The decision and order of the Board (Pet. App. A-11 to A-95) are reported at 247 N.L.R.B. 1299.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1981. A petition for rehearing was denied on December 23, 1981 (Pet. App. A-114). Justice Brennan granted an extension of time within which to file the petition to May 22, 1982 (Pet. App. A-115), and the petition was filed on that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

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[1] We have lodged a copy of the opinion of the court of appeals with the Clerk of this Court.

STATEMENT

1. In late 1977, petitioner and Textile Workers Union of America, Local 1057, which represents production and maintenance employees at petitioner's textile factory, negotiated a new collective agreement (Pet. App. A-2, A-22). The agreement was reduced to writing in April 1978. When Union shop chairman Pacheco discovered that the written contract did not contain a health and safety clause, he pointed out the omission to the Union's general manager, Kenneth Dufault.[2] Dufault had not participated in the contract negotiations. He therefore questioned petitioner's representatives about the asserted omission. They advised him that the parties had intended to establish the health and safety committee only on a trial basis, and further that petitioner was to select all members of the trial committee (Pet. App. A-22 to A-23). The Union scheduled an employees' meeting for May 7, to discuss the omission of the health and safety clause from the contract (Pet. App. A-23).

After consulting Pacheco and shop steward George Cummings, a group of employees drafted a leaflet concerning the omission of the health and safety clause (Pet. App. A-23). The one-page leaflet (Pet. App. A-92 to A-93), entitled "Fight For Safety Now * * * Before It's Too Late," stated in pertinent part (Pet. App. A-2 to A-3):

> Pioneer Finishing is a dangerous place to work. * * * In 1977 alone, there were 28 serious accidents resulting in 2,248 hours of lost time and wages! Which

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[2]Pacheco thought the agreement included establishment of a health and safety committee comprised of two members selected by the Union and three members selected by petitioner (Pet. App. A-44 to A-45; Tr. 727).

"Tr." refers to the transcript of the unfair labor practice proceedings before the Board.

> of us will be victims of these crippling accidents in 1978? How many of us risk accidents daily because of holes in the floor, falling lights, defective trucks and machinery, etc? Only an effective Health & Safety Committee can ensure a safer future for us all. * * *
>
> The company wants the Health & Safety clause striken from the contract. * * * The reason the company wants this is clear. After all, an effective Health & Safety Committee forcing the company to fix the hazards affecting you and I is bound to cost them money. * * * [3]

Under the heading "What Must We Do to Force The Company to Back Down" the leaflet urged employees to show the Union that the health and safety committee was "too important * * * to give up" by (1) attending the May 7 meeting, (2) encouraging fellow employees to attend that meeting as well, and (3) reporting safety and health problems to union representatives. The leaflet had been approved by Pacheco, and his name and union office appeared on the leaflet (Pet. App. A-93).

On May 2, Pacheco entered petitioner's facility to distribute copies of the leaflet to employees working on the second shift. Pacheco sought out shop steward Cummings, who then accompanied Pacheco while he distributed the leaflet. Pacheco and Cummings proceeded to a dyehouse; Pacheco showed the leaflet to the foreman and then distributed it to employees in the dyehouse. Pacheco and Cummings proceeded to another dyehouse; Pacheco handed the

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[3]The factual data were derived from a Summary of Occupational Injuries and Illnesses for 1977, posted by petitioner on a bulletin board in its facility, which stated that 28 injuries occurred in 1977 and that a total of 281 days of lost work time resulted from nine of the injuries. The authors of the leaflet arrived at the figure of 2,248 lost hours by multiplying the number of lost days by the number of work hours in each day, eight (Pet. App. A-40 to A-41).

leaflet to the dyehouse foreman, and then distributed copies to the other employees (Pet. App. A-23 to A-25). The employees did not stop running their machines to receive the leaflet (Pet. App. A-35 to A-36). Distribution of the leaflet in each of the dyehouses was completed in ten to fifteen minutes (Pet. App. A-25).

On May 5, petitioner's president suspended Pacheco. The stated reason for the suspension was Pacheco's distribution of the leaflet. More specifically, Pacheco's suspension letter stated that he had distributed the leaflet without clearance from management and failed to use the contractually specified method of posting notices on the facility's bulletin board. The suspension letter also stated that the leaflet was "libelous, misleading, false and inflammatory" because: the 28 accidents in 1977 were not all "serious" or "crippling"; the leaflet suggested that petitioner opposed an effective health and safety committee to avoid increased costs and did not intend to live up to its contractual obligations; and the leaflet was meant to "incite workers to possible illegal acts or actions" (Pet. App. A-25 to A-26). Petitioner discharged Pacheco within a week after the suspension for the same reasons (Pet. App. A-29).

The Union took Pacheco's case to arbitration under the collective bargaining agreement. The arbitrator found that Pacheco had been "justifiably" discharged (Pet. App. A-113). Pacheco's activities were unprotected under the contract because writing and distributing the leaflet exceeded his authority as a union shop chairman and because the contents of the leaflet adversely affected the "harmonious relationship" between the Union and petitioner (Pet. App. A-110 to A-111).

2. Upon charges filed by Pacheco, the Board, adopting the decision of the administrative law judge in pertinent part, concluded that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C.

158(a)(1) and (3), by suspending and discharging Pacheco for distributing the leaflet (Pet. App. A-16, A-43 to A-44).[4] The Board declined to defer to the arbitrator's decision since he had failed to address the statutory issues and his decision was clearly inconsistent with the purposes and policies of the Act (Pet. App. A12-A21); as the law judge had explained (Pet. App. A-54 to A-55):

> The decision does refer to the concept of "protected activitity," but the arbitrator defines that term in a sense totally at odds with the statute, and his statement of the issue presented indicates that he felt confined solely to contractual questions: "The issue before me was *not* whether certain employees thought unsafe conditions existed, but whether Pacheco exceeded the Contract in doing what he did" * * *. The arbitrator nowhere conveys an awareness of the statutory principles implicated in such an issue, and his decision, in my view, abridges those principles.

The law judge observed that Section 7 of the Act, 29 U.S.C. 157, protects the right of employees "to communicate with fellow employees concerning their common working conditions" (Pet. App. A-34). The time and manner of Pacheco's distribution breached no regulation of petitioner (Pet. App. A-34 to A-39). Further, the law judge explained that Pacheco's "zealous and dramatic expression of his concern [over safety problems] does not deprive him of the Act's protection" (Pet. App. A-43). Pacheco could have reasonably regarded 28 injuries as "serious" (Pet. App. A-42 to A-43); "[t]he assertion in the leaflet that [petitioner's] fear of

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[4]In addition, the Board found that petitioner had violated Section 8(a)(1) of the Act by threatening and discharging other employees for protected conduct. Pet. App. A-44 to A-45, A-74, A-86. The court of appeals enforced the Board's order with respect to the discharged employees, but found it unnecessary to consider the threat. *Pioneer Finishing Corp.* v. *NLRB*, No. 81-1038 (1st Cir. Nov. 23, 1981), slip op. 5 n.2, 12-17.

increasing costs lay behind its opposition to a safety committee is part of the traditional stuff of labor disputes" (Pet. App. A-44). Finally, the law judge found that Pacheco believed in good faith that the safety committee clause had been agreed upon in the negotiations (Pet. App. A-45 to A-46).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A-2). The court found that the law judge had not "abused his discretion in deciding that the factors calling for deference [to the arbitrator's decision] were not present," since "the arbitrator did not adequately address the statutory issue" (Pet. App. A-5). The court pointed out that the arbitrator "was solely concerned with whether Pacheco had violated the contract by distributing the leaflets" (Pet. App. A-5). It acknowledged that, "when the statutory and contractual issues are congruent," consideration of the "contractual issues may determine the statutory issues." In this case, however (Pet. App. A-6),

> the finding that the contract was violated, even if taken as correct, does not of necessity determine that Pacheco had no protection under the statute. To so determine, the arbitrator would have had to consider the separate, statutory issues: whether the content of the leaflet was protected under the statute and whether the contract waived statutory rights to enter and to distribute the leaflet. These issues require individualized analysis and hence prevent deference where, as here, there is no indication that this analysis has been performed.

The court also sustained the Board's finding that Pacheco's activities were protected by the Act. With respect to the wording of the leaflet, the court explained (Pet. App. A-8):

> While the portrayal of the 28 injuries as serious or crippling was not accurate, we agree with the Board's assessment that the leaflet's characterization of the

injuries was "rhetorical hyperbole" not to be construed as fact by fellow employees. There is no evidence that any misstatements of fact were made maliciously or without some foundation in fact. See *El Mundo Broadcasting Corp., supra,* 108 N.L.R.B. at 1280. We also agree with the Board that the assertion that the company wished to save money is an argument typical to labor disputes, to be interpreted in such a light. Lastly, the Board had reason to conclude that Pacheco was not intentionally maligning the Company when he wrote that he did not think that it would live up to the agreement to include the health and safety clause in the contract. Pacheco genuinely believed that the Company had agreed to the clause during negotiations and that its failure to include the clause was the result of bad faith, not the Company's good faith understanding that the clause was not to be included.

The court agreed with the Board that the contract did not waive the statutory right of employees to distribute union materials; that the fact that Pacheco was off-duty at the time that he entered the premises did not render his activity unprotected; and that the fact that the leaflets were distributed to employees who were at work did not, in the circumstances here, justify Pacheco's discharge (Pet. App. A-9 to A-10).

ARGUMENT

1. Section 10(a) of the National Labor Relations Act, 29 U.S.C. 160(a) vests the Board with exclusive authority to adjudicate and remedy unfair labor practices. See *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 436-437 (1967). Although the Board may in its discretion elect to defer to arbitral processes, it is not compelled to do so when an unfair labor practice has been committed. See *NLRB* v. *Strong*, 393 U.S. 357, 360-362 (1969). When the Board does assert jurisdiction, its unfair labor practice decisions take precedence

over arbitral awards that enforce private contract rights. See *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964).

Consistent with these principles, the Board defers to an arbitration decision only if (1) the arbitrator has considered and disposed of the unfair labor practice issue presented to the Board; (2) the arbitrator's decision is not repugnant to the purposes and policies of the Act; (3) the arbitration procedures are fair; and (4) the parties have previously agreed to be bound by the arbitrator's decision. *Suburban Motor Freight Co.*, 247 N.L.R.B. 146 (1980); *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955). In this case the court of appeals agreed with the Board that the arbitrator had not considered the unfair labor practice issue. Under settled principles, deferral was therefore inappropriate.

As the court of appeals correctly noted (Pet. App. A-6), "the arbitrator's decision did not reflect, directly or indirectly, consideration of any factors germane to the statutory issue." On the contrary, the arbitrator's decision (*id.* at A-5) "clearly evidences that he was solely concerned with whether Pacheco had violated the contract by distributing the leaflets." See also *id.* at A-110 to A-112. In some cases, whether the contract has been violated and whether there has been an unfair labor practice may be essentially the same question. See, *e.g.*, *Liquor Salesmen's Union Local 2* v. *NLRB*, 664 F. 2d 318, (2d Cir. 1981), cert. denied, No. 81-1544 (May 17, 1982). In this case, however, the arbitrator's dubious "finding that the contract was violated, even if taken as correct, does not of necessity determine that Pacheco had no protection under the statute" (Pet. App. A-6). Focusing on the asserted violations of the collective bargaining agreement, the arbitrator manifested no appreciation of the fact that "the Act protects expression that

may not be totally accurate," or that " 'rhetorical hyperbole' is common in labor disputes and must be protected" (Pet. App. A-8, citing *Old Dominion Branch No. 496, National Association of Letter Carriers* v. *Austin*, 418 U.S. 264, 286 (1974); *El Mundo Broadcasting Corp.*, 108 N.L.R.B. 1270, 1278 (1954).[5] Nor did he consider whether the contract waived Pacheco's statutory rights as an "employee" to enter the plant and to distribute the leaflet.[6]

2. Contrary to petitioner's contention (Pet. 22-29), the decision of the court of appeals creates no conflict among the circuits on the only issue in this case. *NLRB* v. *Pincus Brothers*, 620 F. 2d 367 (3d Cir. 1980), on which petitioner primarily relies (Pet. 22-26), is inapposite. The arbitrator in that case had expressly considered and resolved the unfair labor practice issues (see *Pincus Brothers*, 237 N.L.R.B. 1063, 1064 (1978)). Here, by contrast, the arbitrator has not given any hint that he even recognized the unfair labor practice issues involved. See *NLRB* v. *General Warehouse Corp.*, 643 F. 2d 965, 970 n.20 (3d Cir. 1981) (distinguishing *Pincus* on the ground that the *Pincus* arbitrator had discussed the factors relevant to the unfair labor practice

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[5]The arbitrator found (Pet. App. A-109) that Pacheco "grossly exaggerated * * * the safety record of the plant" "with the intent to deliberately mislead." Petitioner contends (Pet. 32-36) that this finding is tantamount to a conclusion that Pacheco's conduct was unprotected under the Act. Having properly refused to defer to the arbitrator's decision, of course, the Board was not bound by his findings of fact. Moreover, as noted in the text, the arbitrator concedes nothing to "rhetorical hyperbole," which is common in labor disputes and protected under the Act.

[6]The arbitrator found (Pet. App. A-111) that Pacheco's "illegal entry into the plant and the circularizing of the captive workers on the 2nd shift were contrary to Article I and Article II, Sections (D) and (E)" of the contract. Article II (D) and (E), however, regulate the Union's conduct of official business within the plant, and, as the law judge and the court found (Pet. App. A-9, A25 to A26, A-29 to A-30, A-32 to A-33), have no application to Pacheco's activity as an employee.

issue). Similarly, *Douglas Aircraft Co.* v. *NLRB*, 609 F. 2d 352, 353 (9th Cir. 1979), is irrelevant. In *Douglas Aircraft* the Ninth Circuit rejected the Board's conclusion that the arbitral award was repugnant to the policies of the Act. See *NLRB* v. *Max Factor & Co.*, 640 F. 2d 197, 203-204 (9th Cir. 1980), cert. denied, 451 U.S. 983 (1981). In this case, the court of appeals found it unnecessary to consider whether the arbitrator's award was repugnant to the policies of the Act since deferral was inappropriate for other reasons (Pet. App. A-7).[7]

In *Liquor Salesmen's Union Local 2* v. *NLRB, supra* (Pet. 25-26), the contract issue and the unfair labor practice issue were the same. The Second Circuit found that the arbitrator's conclusion, based on the contract and past practice, that there had been no change in working conditions "was necessarily dispositive of the statutory issue; if no change in working conditions was imposed, no duty to bargain arose, and no unfair labor practice could have been committed" (664 F. 2d at 325). Here, however, Pacheco's conduct could have violated the contract and still have been protected by the Act (see Pet. App. A-32 to A-39). Similarly, in *NLRB* v. *Motor Convoy, Inc.*, 673 F. 2d 734 (4th Cir. 1982), the court concluded that the arbitrator necessarily found that the employee was not discharged for union activity when he upheld a discharge for cause, because there was a non-discrimination clause in the contract.[8]

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[7]Thus, amicus Council on Labor Law Equality errs in asserting (Br. 15-22) that the decision of the court below conflicts with *Pincus* and *Douglas Aircraft*.

[8]Contrary to the submission of amicus Council on Labor Law Equality (Br. 11-15), nothing in the decision of the court below suggests that an arbitrator's decision is entitled to deference only if the arbitrator explicitly discusses the statute. The court concluded (Pet. App. A-6) that the arbitrator's decision failed to reflect "directly or indirectly" any consideration of the factors relevant to the unfair labor practice issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY TO BRIEF OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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TABLE OF AUTHORITIES CITED

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REPLY TO BRIEF OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The N.L.R.B.'s characterization of the principle question involved in this case as an "abuse of discretion" issue is an obvious ploy designed to mask the deleterious impact of the decision below upon the role that arbitration plays in effectuating national labor policy.

Notwithstanding the Board's frail attempt to glean technical distinctions between the First Circuit's decision at bar and the clearly contradictory conclusions of other circuits, the federal appellate courts are adrift in a sea of confusion over the practical consequences of the Board's elusive standards for determining when it must defer to an arbitrator's decision. In the absence of a reasonable degree of certainty in this area,

employers and unions will become increasingly reluctant to submit their disputes to the arbitration process. Because the contractual resolution of disputes through arbitration is a cornerstone of our national labor relations policy, it is imperative that this Court establish the guidelines necessary to restore certainty to the process.

This Court's recognition of the importance of arbitration as an indispensable element of the collective bargaining process requires no elaboration. *See, e.g., Boys Market, Inc. v. Retail Clerks,* 398 U.S. 235, 252 (1970); *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 596 (1960); *United Steelworkers of America v. Warrior & Golf Navigation Co.,* 363 U.S. 574, 578 (1960); *cf* Burger, *Isn't There A Better Way?* 68 A.B.A.J. 274 276 (1982). However, the arbitration process cannot be effective in fulfilling its function if arbitrators' decisions are cavalierly ignored, if the arbitrator is forced into the role of a mini-NLRB, or if there is no incentive for the parties to submit to arbitration. The decision below, contrary to the rulings in other circuits, authorizes these unfortunate prospects and, thereby, diminishes the viability of arbitration.

The genesis of the problem rests with the NLRB's decision in *Suburban Motor Freight Co.,* 247 N.L.R.B. 146 (1980). Prior to *Suburban Motor,* the generally recognized criteria, as ennunciated in *Spielberg Manufacturing Co.,* 112 N.L.R.B. 1080 (1955), authorized deferral when (1) the parties agreed to be bound by the arbitrator's decision; (2) the procedures were fair; and (3) the decision was not repugnant to the purposes and policies of the Act. Despite changes in focus, interpretation and emphasis, these criteria remained relatively constant until 1980 when, in *Suburban Motor,* the Board announced that "we will no longer honor the results of an

arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator."[1]

Suburban Motors thus provided a trump card to a participant in an arbitration proceeding who could submit to arbitration and withhold the unfair labor practices claim or inferentially raise the claim and place the arbitrator in an untenable situation. This has led the courts to adopt a variety of disparate standards for reviewing the arbitrator's conduct.

In *NLRB v. Pincus Brothers, Inc.*, 620 F.2d 367 (3d Cir. 1980) and *NLRB v. General Warehouse Corp.*, 643 F. 2d 965 (3d Cir. 1981), the Third Circuit established the principle that deferral was required when the record revealed "some evidence" that the unfair labor practice contention had been decided.[2] In *Distillery Workers, Local 2 v. NLRB*, 664 F.2d 318 (2d Cir, 1981), *cert denied sub nom, Liquor Salesmen's Union Local 2 v. NLRB*, ____ U.S. ____ (No. 81-1544; 5-17-82), the Second Circuit held deferral appropriate when the arbitrator's findings of fact were "necessarily dispositive of the statutory issue" and the issue had been decided "in substance." 664 F.2d at 325. The Fourth Circuit has gone even further in *NLRB v. Motor Convoy, Inc.*, 673 F.2d 734, 736 (4th Cir, 1982), in concluding that a dismissal for "just cause" under a collective bargaining agreement inherently contains a resolution of whether the employee was fired for an illegal or illicit cause.[3]

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[1] The NLRB's brief in opposition implies that this new standard is one of four established criteria which have had longstanding acceptance. *But see* Motor Convoy, Inc. v. NLRB, 673 F.2d 734, 735 n.2 (4th Cir. 1982).

[2] The NLRB's attempt to distinguish these decisions on the ground that the arbitrator in *Pincus Brothers* considered the statutory question while the arbitrator in *General Warehouse* did not misses the point. The question is what legal standard must be employed in reviewing the record, not what the record shows, as a factual matter, when tested by that standard of review.

[3] *See also* Douglas Aircraft Co. v. NLRB, 609 F.2d 352, 355 (9th Cir. 1979) ("The reasoning, if ambiguous, could have been in order to give arbitration the 'hospitable acceptance' necessary if 'complete effectuation of the Federal Policy is to be achieved.' ").

The cogent rational underlying the development of a responsible judicial standard for reviewing the degree to which the record must reflect the arbitrator's consideration of the statutory issue was best articulated in *Motor Convoy*:

> To allow such a reversal runs counter to well established federal labor policy which strongly favors peaceful resolution of disputes through private arbitration. See United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). If Petitioner is correct in its asserted approach to this problem, litigants in [the employee's] position would be motivated not to submit unfair labor practice charges to arbitration as provided in their collective bargaining agreements. Instead, during an arbitration proceeding, an employee would not assert a possible unfair labor practice charge but hold it in reserve for "appeal" to the National Labor Relations Board in case of an adverse ruling. Arbitration would become nothing more than a costly extra step in the march to federal court rather than the cost efficient and rapid resolution of disputes it is designed to be. As a consequence, it is certain that arbitration machinery would be included in fewer collective bargaining agreements inevitably expanding unnecessarily the caseloads of the federal courts and the National Labor Relations Board.

673 F.2d at 736-37.

In the opinion below, the First Circuit ignored these important policy considerations in holding that the record must reflect an "individualized analysis" of the statutory issues. Concluding that "[i]t is not enough that the parties raised the statutory issues before the arbitrator and that one might decide that he considered those issues by virtue of the fact he chose

instead to rest his decision on contractual grounds", the decision below converts the arbitrator into a mini-NLRB, and, thereby, frustrates the important objectives of arbitration.

To assure that the decision below, in bold contrast to the rulings from other circuits, does not defeat the role of arbitration as a meaningful adjunct of collective bargaining or deter parties from participating in the arbitration process, it is essential that this Court resolve the conflict and determine the precise legal standards under which the NLRB is compelled to defer to an arbitrator's decision with respect to unfair labor practices issues.

CONCLUSION

For these reasons, as well as those stated in our Petition For A Writ Of Certiorari and those advanced by Amicus Curiae In Support Of The Petition, the writ should be granted.

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF PETITION FOR CERTIORARI

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United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 23

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Comment, Judicial Review and the Trend Toward More Stringent NLRB Standards On Arbitral Deferrals, 129 U. Pa. L. Rev. 738 (1981) 20

Irving, Arbitration and the National Labor Relations Board, 35 Arb. J. 5 (1980) 29

Kaden, Judges and Arbitrators: Observations on the Scope of Judicial Review, 80 Colum. L. Rev. 267 (1980)..... 26

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AND KENNETH PACHECO, et al.,

RESPONDENTS.

On Petition For A Writ Of Certiorari To
The United States Court of Appeals
For The First Circuit

BRIEF AMICUS CURIAE ON BEHALF OF COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF AMICUS CURIAE*

The Council on Labor Law Equality ("COLLE") is a national association of

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*Pursuant to Rule 36.2 of the Rules of this Court, written consents of the

large and small employers formed to monitor the activities of the National Labor Relations Board and other developments relating to the NLRA and to give support in those cases or on those issues which affect a broad section of industry. COLLE was formed in recognition of the need for a specialized and continuing business community effort to provide assistance in the review of NLRB and court decisions in order to maintain a balanced approach in the formation and interpretation of national labor policy.

Pioneer Finishing Corporation's Petition for Writ of Certiorari raises the important question of when the National Labor Relations Board should defer to an arbitrator's award in a matter which has given rise to both a contractual grievance and an unfair labor practice charge. Pioneer discharged an employee for distributing without permission a misleading leaflet derogating the Company's safety record.

An arbitrator upheld the discharge and ruled that the grievant's unauthorized distribution of the false leaflet and his attempts to alter the collective bargain were not "protected activity." The Board refused to defer to the arbitrator's award and found the employer in violation of the Act, and the First Circuit enforced the Board's order.

The issues of when an award is repugnant to the Act and whether an arbitrator must actually address the statutory issue (rather than simply dispose of the core statutory issue in finding facts and resolving the contractual dispute) are extremely important to employers. The decision below represents a serious threat to the efficacy of the arbitration process, a process which plays a major role in national labor policy. Routinely affording unions "another bite of the apple" if they are disappointed with the results of bargained-for arbitration will seriously undermine the benefits to employees of agreeing to a grievance arbitration procedure in the first

place.

SUMMARY OF THE ARGUMENT

For almost three decades, the Board has had a policy of deferring to an arbitration award if (1) the proceedings were fair and regular; (2) the parties had agreed to be bound; and (3) the arbitration award was not clearly repugnant to the policies of the Act. Spielberg Manufacturing Co., 112 N.L.R.B. 1080 (1955). In Suburban Motor Freight, Inc., 247 N.L.R.B. 146 (1980), the Board also revived a requirement that the unfair labor practice issue must have been presented to and considered by the arbitrator.

In the case at bar, the Board refused to defer to the arbitrator's award and went on to find that Pioneer had violated Sections 8(a)(1) and (3) of the Act. The United States Court of Appeals for the First Circuit enforced the Board's order, upholding the Board's refusal to defer on the grounds that the arbitrator had not adequately addressed the statutory issue and that the arbitrator's decision was repugnant to the purpose and policies of the Act.

On the issue of when an arbitrator's award is "clearly repugnant" the decision of the First Circuit below conflicts with the Third Circuit's decision in NLRB v. Pincus Brothers, Inc., 620 F.2d 367 (3rd Cir. 1980) and with the Ninth Circuit's decision in Douglas Aircraft Co. v. NLRB, 609 F.2d 352 (9th Cir. 1979).[1] On the issue of whether the arbitrator must specifically address the unfair labor practice issue, the Court below is in conflict with the Second Circuit[2] and

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[1]And, indeed, it is inconsistent with the recent position of the Board in G&H Products, Inc., 261 N.LR.B. No. 47, 110 L.R.R.M. 1036 (1982)

[2]Liquor Salesmen's Union, Local No. 2 v. NLRB, 664 F.2d 318 (2d Cir. 1981) cert. denied sub nom. Liquor Salesmen's Union v. Charmer Industries, Inc., 50 U.S.L.W. 3916 (U.S. May 17, 1982) (No. 81-1544).

the Fourth Circuit.[3] Furthermore, the refusal of the Court below to defer to an arbitrator unless he has specifically addressed the potential statutory issue is contrary to national labor policy as articulated in the decisions of this Court. This split in authority and the importance of assuring that the arbitration process will continue to serve national labor policy commend this case to the attention of this Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS OVER WHEN THE BOARD OUGHT TO DEFER TO AN ARBITRATOR'S AWARD

In Spielberg Manufacturing Company, 112 N.L.R.B. 1080 (1955), the National Labor Relations Board enunciated a policy of deferring to an arbitrator's award

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[3] NRLB v. Motor Convoy, Inc., __ F.2d __, 109 L.L.R.M. 3201 (4th Cir. 1982).

where: (1) the proceedings were fair and regular; (2) the parties had agreed to be bound by the arbitrator's decision; and (3) the arbitrator's award is not "clearly repugnant to the purposes and policies of the Act." Id. at 1082. The Board adopted this deferral policy out of its belief that "the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrator's award." Id.

A fourth deferral criterion has developed over the years and has been variously formulated. In Raytheon Co., 140 N.L.R.B. 883 (1963), enforcement denied on other grounds, 326 F.2d 471 (1st Cir. 1964), the Board declined to defer where the arbitrator had been precluded from considering the unfair labor practice issue underlying the contractual discharge grievance. In Suburban Motor Freight, 247 N.L.R.B. 146 (1980), the Board announced that it would not abide by an arbitrator's award unless the unfair labor practice issue had been both presented to and considered by the

arbitrator.[4] However, in the subsequent refusal to bargain case of Bay Shipbuilding Corp., 251 N.L.R.B. 809 (1980), the Board deferred to the arbitrator's award despite the arbitrator's silence on the U.L.P. issue. The award met the three Spielberg criteria, and all the Board required of the arbitrator was that he had made factual findings which also resolved the U.L.P. question. Id. at 810.[5]

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[4] Member Penello vigorously dissented, arguing that unless unusual circumstances had prevented the grievant from raising the discrimination issue during arbitration, the Board should accept the arbitrator's award and avoid "multiple litigation of the same set of facts." 247 N.L.R.B. at 147.

[5] In his concurring opinion, Member Truesdale defined the critical question for deferral purposes as "whether there

The Fourth Circuit has recently phrased this fourth criterion as a requirement that "the unfair labor practice charges were resolved." NLRB v. Motor Convoy, Inc., ___ F.2d ___, 109 L.R.R.M. 3201, 3202 (4th Cir. 1982).

In the case at bar, the ALJ felt that the arbitrator had confined himself to the contractual question. Since the arbitrator's award "was not consistent with the determination the Board would make," 247 N.L.R.B. at 1307, the ALJ concluded that the award failed to meet the third Spielberg standard (that an award not be "clearly repugnant" to the Act). The Board panel affirmed the ALJ without discussion of this issue. The First Circuit read the ALJ's decision as

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is a parallelism between the contractual and statutory issues, such that, by resolving the contractual issue, the arbitrator implicitly resolved the unfair labor practice." Id. at 811.

refusing to defer because the arbitrator had not considered the statutory issues and because the result he had reached was not consistent with the Act. The Court below accepted the Board's refusal to defer, on the ground that the arbitrator "did not adequately address the statutory issue." [A-5][6] The Court also observed that implicit in its finding that the grievant had engaged in protected activity is a judgment that the result reached by the arbitrator was contrary to the purpose and policies of the Act. [A-7]

This decision of the First Circuit conflicts with decisions of several other Courts of Appeals regarding the necessity that the arbitrator have addressed the ULP issues and also regarding the proper standard for rejecting an award as

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[6]Such references indicate pages in the Appendix to Pioneer's Petition for Writ of Certiorani.

"repugnant to the Act".

A. The Circuits Are Divided Over Whether The Board Ought To Defer To Any Award Which Resolves The Underlying Unfair Labor Practice Issue Without Discussing It As A Statutory Issue

Arbitrator Robert A. Browning upheld Pioneer's discharge of Mr. Pacheco, ruling that his preparation and unauthorized circulation of a deliberately misleading leaflet was beyond the scope of "protected activity." [A-110 to -111] Nevertheless the Court below rejected the arbitrator's award "because the arbitrator did not adequately address the statutory issue." [A-5]

The belief of the Court below that in order for an arbitator's award to be worthy of deference the arbitrator must have addressed the statutory issue is in conflict with the position taken by the Second Circuit in Liquor Salesmen's

Union, Local 2 v. NLRB, 664 F.2d 318 (2d Cir. 1981), cert. denied sub nom. Liquor Salesmen's Union v. Charmer Industries, Inc., 50 U.S.L.W. 3916 (U.S. May 17, 1982) (No. 81-1544). In that case, the union claimed both in a contractual grievance and in a U.L.P. charge that the employer unilaterally changed collection procedures for salesmen. The company won at arbitration, but the Board refused to honor that determination because the arbitrator had not specifically disposed of the U.L.P. allegation [§8(1)(5) refusal to bargain]. The Board found a violation, but the Second Circuit refused to enforce the Board's order. The circuit court held that in deciding the contractual grievance, the arbitrator had "in substance" decided the statutory issue as well. Therefore, said the court, the Board should have deferred to the arbitrator's decision.

The Second Circuit recognized that the arbitrator in Liquor Salesmen's

had reached his decision on the basis of contract interpretation and past practice but the court also realized that his determination "was necessarily dispositive of the statutory issue." 664 F.2d at 325. In language equally applicable to the case at bar, the court concluded:

> Because both the contractual and statutory issues rest on the same factual determinations, the arbitrator's better position and expertise as a fact-finder strengthen the case for deference to his findings. . . . Under these circumstances, to insist here that the arbitrator announce that his resolution of the contractual dispute is intended as a resolution of the statutory issue as well is to impose a purely formalistic requirement.

Id. (citation omitted)

The Fourth Circuit has also held that it was unnecessary for an arbitrator to specifically address the U.L.P.

issue, where resolution of the contract issue discussed by the arbitrator necessarily resolved the U.LP. issue. NLRB v. Motor Convoy, Inc., ___F.2d ___, 109 L.R.R.M. 3201 (4th Cir. 1982). Motor Convoy involved an arbitrator's decision that the employer had had "just cause" to discharge the grievant. Besides the usual "just cause" requirement, the labor agreement also contained a prohibition of discrimination based upon an employee's union activities. The Fourth Circuit concluded that "inherent in [the arbitrator's finding of just cause] was a resolution of the question of whether [the grievant] was fired for an illegal or illicit cause, such as protected union activities." Id. at 3203.

Since such guarantees against discrimination for union activities are quite common in modern labor agreements,[7] a vast number of

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[7]Of a sample of 400 contracts. 49% contained guarantees against discrimination for union activities or

collective bargaining agreements will generate grievance arbitration awards which will be entitled to deference under the Fourth Circuit's view but which will not be accorded deference by the First Circuit unless the arbitrator happens to address himself to the statutory issue which mirrors the contractual one.

B. The Circuit Courts Are Divided Over When The Board Can Reject An Arbitrator's Award as "Repugnant To The Act"

The third deferral criterion enunciated by the Board in Spielberg is that the arbitrator's decision be "not clearly repugnant to the purposes and policies of the act." 112 N.L.R.B. at 1082. In the case at bar, the ALJ ruled that the arbitrator's award was repugnant to the Act "[s]ince I conclude that the

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membership. 2 Collective Bargaining Negotiations & Contracts [BNA] 95:5 (1979).

disposition made by the arbitrator was not consistent with the determination the Board would make." [A-55] The court below agreed that the arbitrator's result was contrary to the purpose and policies of the Act. [A-7][8] This easy equation of any decision the Board might make differently in a trial de novo with a decision that is "clearly repugnant to the purposes and policies of the Act" is contrary to decisions of several other Circuit Courts (and contrary to other decisions by the Board itself).

The decision below is in direct conflict with the decision of the Third Circuit in NLRB v. Pincus Brothrs, Inc.-Maxwell, 620 F.2d 367 (3rd Cir. 1980). The facts of Pincus Brothers are strikingly similar to the case

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[8]However, the court based its decision primarily on its conclusion that the arbitrator had failed to adequately address the statutory issue underlying the grievance. [A-5]

at bar. The employer discharged an employee for distributing during working and nonworking time a leaflet which intentionally misrepresented the facts regarding the Company's employment practices and products. The employee grieved her disharge, and an arbitrator ruled she had been discharged for "cause" and that her conduct had been unprotected. The Board refused to defer to the arbitrator's decision and went on to find that the firing had been an unfair labor practice.

The Third Circuit denied enforcement, holding that it was an abuse of discretion for the Board to refuse to defer to any award which is arguably not inconsistent with Board policy. Id. at 374. The Third Circuit concluded that where an arbitral result is only arguably correct (and might be decided differently in a trial de novo), the national policy in favor of labor arbitration outweighs the need for uniformity of results or for correct resolution of every individual dispute. Id. at 374. As the court explained:

> Deference by the Board to the arbitration process, especially when the award has already been rendered and it is arguably consistent with Board policy, will effectuate the intent of the parties in the collective bargaining agreement and avoid the time, expense and inconvenience of duplicative proceedings. The parties accepted the risk that arbitration results could differ from Board decisions when they elected to proceed by arbitration and the Board recognized the possibilities when it adopted the policy to defer to an arbitrator's award.

Id. at 374-75.

In Douglas Aircraft Company v. NLRB, 609 F.2d 352 (9th Cir. 1979), a case relied on by the Pincus Brothers court, the Ninth Circuit ruled that it was an abuse of discretion for the Board to refuse to defer where one of two readings of an arbitrator's award would not be repugnant to the Act. Spielberg calls for acceptance of an award which is

"not clearly repugnant." The Court pointed out a basic semantic fact overlooked by the ALJ and the court below in the instant case:

> If the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award was "clearly repugnant" to the Act. Nor can it be said that such an award was "palpably wrong."

Id. at 354.

In rejecting the arbitrator's decision in the case at bar because the Board would have decided the dispute differently de novo, the Board and the court below have thrown the basic Spielberg doctrine out the window.[9]

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[9]Indicative of the retreat from Spielberg is a study of Board deferral decisions from 1977-80 which concluded: "When faced with the choice of either

In Spielberg itself, the Board decided to defer to the arbitrator despite the Trial Examiner's finding that there had been an unfair labor practice. The contrary arbitrator's award was not "clearly repugnant": "[T]he arbitration award is not . . . at odds with the statute. This does not mean that the Board would necessarily decide the issue . . . as the arbitration panel did." 112 N.L.R.B. at 1082.

The Board itself quite recently has returned to the spirit of Spielberg, in a decision which contradicts the position which was taken by the ALJ in the case at bar and endorsed by the Court below. In

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deferring to an arbitrator's decision or reviewing the case on its merits, then, the NLRB ignored the arbitrator's award about eighty-two percent of the time." Comment, Judicial Review and the Trend Toward More Stringent NLRB Standards on Arbitral Deferrals, 129 U. Pa. L.Rev. 738, 753 (1981).

the instant case, the ALJ and court took "not clearly repugnant" to mean, in effect, "is consistent with the decision the Board would make." But in the recent case of G & H Products, Inc., 261 N.L.R.B. No. 47, 110 L.R.R.M. 1036 (1982), the Board explained that "[i]n determining if an arbitrator's award is clearly repugnant under Spielberg, the test to be applied is not whether the Board would have reached the same result, but whether the award is palpably wrong as a matter of law." Id. at 1036, citing International Harvester Co. (Indianapolis Works), 138 N.L.R.B. 923, 926 (1962). The practical effect of following a result-oriented deferral policy was previously recognized and rejected by the Board in Roy Robinson, Inc. d/b/a Roy Robinson Chevrolet, 228 N.L.R.B. 828 (1977). In that case, an ALJ had refused to defer to the arbitration process[10] on the ground;

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[10] Under Collyer Insulated Wire, 192 N.L.R.B. 837 (1971).

inter alia, that an arbitration proceeding on the merits of the dispute "might very well result in a dismissal of the grievance, while a contrary result would result under the Act." Id. at 838. The Board instead chose to defer to aritration and observed that "if the Administrative Law Judge's reasoning were accepted, deferral to arbitration would be an exercise in futility." Id. at 829.

II. THE FIRST CIRCUIT'S REQUIREMENT THAT THE ARBITRATOR HAVE SPECIFICALLY ADDRESSED THE UNFAIR LABOR PRACTICE ISSUE IS CONTRARY TO THE ROLE ASSIGNED TO ARBITRATION BY DECISIONS OF THIS COURT

In the case at bar, the ALJ's decision that the arbitrator's award was not entitled to deference was based in part on his conclusion that "the arbitrator's decision rests upon principles of arbitral jurisprudence and articles of the bargaining agreement." [A-54] Criticising an arbitrator for fidelity to the contract from which he draws his charter manifests a basic

misunderstanding of the everyday functioning of industrial arbitration and a departure from this Court's decisions recognizing the essential role of arbitration in today's industrial society.

This Court has long recognized that federal policy is to promote industrial stabilization through collective bargaining and that a "major factor in achieving industrial peace" has been the inclusion of arbitration provisions in collective bargaining agreements. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960). Arbitrators under such collective agreements "are indispensable agencies in a continuous collective bargaining process." United Steelworkers of America v. Enterprise Wheel and Car Corporation, 363 U.S. 593, 596 (1960). However, this Court has also defined the limits within which the arbitrator must confine himself if his decision is to be ultimately enforceable in federal courts:

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation courts have no choice but to refuse enforcement of the award.

Id. at 597. (emphasis added)

Most labor agreements contain arbitration provisions.[11] A great many contracts explicitly prohibit the arbitrator from adding to, subtracting

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[11]The Bureau of Labor Statistics has estimated that almost 97% of major collective bargaining agreements contain grievance arbitration clauses. U.S. Bureau of Labor Statistics, Characteristics of Major Collective

from or modifying the provisions of the contract. The ALJ rejected the arbitrator's decision in the case at bar because "it rests upon principles of arbitral jurisprudence and articles of the bargaining agreement." [A-54] The First Circuit reached the same conclusion, finding that the arbitrator had not adequately addressed the statutory issue. [A-5] Yet this Court has indicated that an arbitration award "based solely upon the arbitrator's view of the requirements of enacted legislation" would exceed the scope of an arbitrator's authority and would not be enforceable. Enterprise Wheel & Car, 363 U.S. at 597. Under the standard employed below in the case at bar, few arbitration decisions sustaining the employer's position would prevent the losing union from relitigating the same facts before the Board. And to dilute the principle

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Bargaining Agreements, Bulletin 2095 (Washington, D.C.: U.S. Government Printing Office, January 1980)

of arbitral finality is destructive of the entire arbitration process as a cornerstone of industrial relations peace.

As one commentator has observe, "the parties have an institutional stake in finality because the arbitrator is their creation; he functions by their consent and at their sufferance, and his powers and roles can and should be molded by them to suit their own purposes." Kaden, Judges and Arbitrators: Observations on the Scope of Judicial Review, 80 Colum.L.Rev. 267, 275 (1980). Another observer has noted the factors leading to the success of arbitration:

> Parties may devise and control the procedure, including the selection and authority of the arbitrator. The process provides an impartial, final, binding decision to disputes. Arbitration awards are attuned to "the law of the shop," rather than to legal points. The process is generally quicker, cheaper, and

> more informal than resolution in the courts. Arbitration as a final step encourages parties to resolve grievances before they reach abitration.

Loewenberg, An Arbitration Timebomb?, 37 Arb. J. 50, 50 (1982).

The Board based its Spielberg deferral policy on its belief that "the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrator's award." 112 N.L.R.B. at 1082. As Member Penello stated in his dissent in Suburban Motor Freight, Inc., 247 N.L.R.B. 146 (1980), Spielberg commits the Board to a purpose of encouraging peaceful settlement of industrial disputes. He cautioned that "[s]uch a purpose can be fatally frustrated by permitting voluntary arbitration agreements to be avoided through multiple litigation of the same set of facts." Id. at 147.

The District of Columbia Circuit has sounded the same theme, stressing that it is important that disputants continue to

be attracted to arbitration for resolution of differences that are susceptible to arbitration. District 1199E, National Union of Hospital & Health Care Employees v. NLRB, 613 F.2d 1102, 1109 (D.C.Cir. 1979). The court indicated that "failure by the Board to give appropriate consideration to an arbitrator's construction of a collective bargaining agreement could 'thwart the strong policy favoring private dispute-solving mechanisms.'" Id., quoting Retail Clerks Local 588 v. NLRB, 565 F.2d 769, 777 n.20 (D.C.Cir. 1977). The same court has also recognized that if the disputants feel that the Board will give de novo consideration to arbitrable issues, the arbitration of controversies involving potential unfair labor practices will be greatly discouraged. Bloom v. NLRB, 603 F.2d 1015, 1019 (D.C. Cir. 1979).

Former NLRB General Counsel John S. Irving, Jr. has urged that voluntary arbitration should be actively encouraged, rather than discouraged. He also explained the ripple effect of a

tightened deferral policy:

> The Spielberg area is extremely important and should not be thrown into doubt by the Board. The fine-tooth-comb approach to reviewing arbitration decisions will do little to encourage private resolution of disputes. Similarly, if the Board raises questions concerning the vitality of Spielberg, the General Counsel, consistent with his perceived responsibility to put issues to the Board, will defer to awards less often and will issue more complaints. More cases will be thrown unnecessarily into the board's machinery and disputants will be encouraged to use government processes, rather than agreed-upon private machinery.

Irving, Arbitration and the National Labor Relations Board, 35 Arb. J. 5 (1980). The consequences for industrial relations of such a disincentive to arbitration are grave. As the Fourth

Circuit warned, an employee whose discharge grievance was being arbitrated would be motivated to save his discrimination argument for "appeal" to the NLRB in case the arbitrator rules against him, and "[a]rbitration would become nothing more than a costly extra step in the march to federal court rather than the cost efficient and rapid resolution of disputes it is designed to be." NLRB v. Motor Convoy, Inc., ___ F.2d ___, 109 L.R.R.M. 3201 (4th Cir. 1982). Naturally, if employers begin to perceive arbitration as a mere preliminary to the "main event" before the Board -- rather than as a consensual procedure to arrive at final, binding resolutions of disputes -- they will be tempted to refuse to arbitrate cases with U.L.P. potential, since they can't "win". If that ever comes to pass, as Member Penello has warned:

> Individuals aggrieved by suspected discrimination in their discipline will then have no alternative but to take their place in line with the

> burgeoning masses of charging parties before the Board with claims of discrimination in discipline or discharge. These individuals will wait, and wait and wait for the protection of rights promised them.

Surburban Motor Freight, Inc., 247 N.L.R.B. 146, 148 (1980) (Member Pennello, dissenting).[12]

The necessity that the Board give "hospitable acceptance"[13] to the arbitration process in order to effectuate national labor policy, the harm to the arbitration process occasioned by "overzealous dissection of

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[12] See also 6 J.Corp.L. 399, 411 (1981).

[13] International Harvester Co. (Indianapolis Works), 138 N.L.R.B. 923, 927 (1962).

opinions by the NLRB"[14] and the failure of the court below to appreciate the proper role of the arbitrator delineated in this Court's decisions all recommended this case for consideration by this Court at this time.

CONCLUSION

For the foregoing reasons, we ask that the writ be granted.

Respectfully submitted,

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[14] Douglas Aircraft Co., 609 F.2d 352, 355 (9th Cir. 1979).